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Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1986

FRANCES LOLA WOMACK, Individually, and as Surviving Spouse of WILLIAM SIDNEY WOMACK, Deceased, JAMES A. CHANDLER, and IVA CHANDLER,

Petitioners,

v.

DONALD J. GETTELFINGER and DORIS Y. GETTELFINGER, d/b/a GETTELFINGER FARMS, and CHARLES S. RITTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Constitution of the United States and this Court's holding in Erie R. R. v. Tompkins, infra, and its progeny compel the Federal Courts in jury trials to apply state standards in determining whether to grant motions for directed verdict or in the entering of judgments not-withstanding the verdict in diversity cases?

2. Does the new federal standard created by Sixth Circuit Judge Nelson for the determining of whether a directed verdict or judgment not withstanding the verdict is proper, violate the provisions of the Seventh Amendment of the United States Constitution?

3. Has Judge Nelson for the Sixth Circuit Court of Appeals failed to apply state law of punitive damages in review of the diversity action below?

LIST OF PARTIES

The plaintiffs in the original proceedings below were petitioners, Frances Lola Womack, individually and as surviving spouse of William Sidney Womack, James A. Chandler, for his own injuries, and Iva Chandler, his wife. The respondents before this Court were the original defendants herein, Donald J. and Doris Gettelfinger, d/b/a Gettelfinger Farms and Charles S. Ritter, the driver of the truck owned by Gettelfinger.

There were separate issues involved in the court below concerning the construction of a

settlement agreement and concerning the issue of contribution among tort feasors. Those issues involved Joe R. Woods and Linda Woods and Ronald D. Kennedy and Hattie Sue Kennedy. Since the aforesaid issues are not addressed in this petition, those persons are not named as parties herein.

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1986

FRANCES LOLA WOMACK, Individually, and as Surviving Spouse of WILLIAM SIDNEY WOMACK, Deceased, JAMES A. CHANDLER, and IVA CHANDLER,

Petitioners,

v.

DONALD J. GETTELFINGER and DORIS Y. GETTELFINGER, d/b/a GETTELFINGER FARMS, and CHARLES S. RITTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Frances Lola Womack, individually and as surviving spouse of William Sidney Womack, James A. Chandler, and Iva Chandler respectfully pray that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on December 29, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 808 F.2d 446, and is also reprinted in the appendix hereto, Appendix A.

The order of the Sixth Circuit Court of Appeals denying the rehearing and denying rehearing en banc is reprinted in the appendix hereto, Appendix B.

The memorandum opinion and order of the United States District Court for the Eastern District of Tennessee denying respondent's motion for judgment notwithstanding the verdict is reprinted in the appendix hereto, Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The panel for the Federal Court of Appeals for the Sixth Circuit entered its judgment below on December 29, 1986. Rehearing and Rehearing En Banc denied, February 19, 1987.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment Seven:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact

> tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This case arose when a tractor trailer operated by respondent, Charles S. Ritter, and owned by respondent Gettelfinger Farms intentionally blocked a two lane highway in the dark and heavy fog. Respondent Ritter did so knowing that it created a hazard, that an accident might result, and without taking steps to warn oncoming traffic of the danger. Shortly, a serious accident occurred when a car in which petitioner Frances Lola Womack's decendant, William Sidney Womack, and petitioner John

A. Chandler were passengers collided with the trailer. In addition to the proof of intentional conduct as to the blocking of the highway without safety precautions, the proof showed the defendant company intentionally violated federal standards as to the hiring, training, and testing of the driver. This driver, hired only by a secretary, had never driven a truck alone and failed the only driver's test he had ever attempted at another company. He was not tested here. In fact, the dispatcher said, "if you can get it out of the drive, you're hired". The only person familiar with the

driver's qualification stated he was incompetent. The proof showed the accident was caused by the incompetentcy. Further, the company intentionally set a policy of violating federally mandated time limits for driving.

Petitioners brought the original action for compensatory and punitive damages in the United States District Court for the Eastern District of Tennessee. Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332.

At the close of an eight day jury trial, the trial judge denied respondent's motion for directed verdict on the issue of punitive damages and submitted the matters

of both compensatory and punitive damages to the jury.

The jury returned a verdict of $610,963.02 compensatory damages and punitive damages totalling $1,250,000.00. Subsequently, the trial judge overruled respondent's motion for judgment not withstanding the verdict on the issue of punitive damages.

In deciding whether or not to grant each of respondent's motions concerning the issue of punitive damages, the trial judge did not expressly articulate whether he followed state or federal standards and restrictions in his evaluation of the sufficiency of the evidence presented at trial on the matter of punitive damages.

Nonetheless, the trial judge in actuality was consistent with the established Tennessee standards in weighing the sufficiency of the evidence to make his determination, finding that "...there was substantial evidence in the record from which the jury could have concluded that punitive damages were warranted" Appendix C, P. 5-6, and further specifically found that "...the plaintiffs produced a great deal of evidence regarding why their position of punitive damages was appropriate and should be sustained." Appendix C, Page 16. Furthermore, this application of the state law standard was required by the federal district judges of the Sixth Circuit. Toth v. Yoder

Co. 749 F.2d 1190 (6th Cir. 1986).

However, Judge Nelson writing for the Sixth Circuit set a new federal standard for federal trial judges in their dispositions of motions for directed verdict and judgments not withstanding the verdict. In deciding that the trial judge below erred in not granting these motions, Judge Nelson reweighed the evidence, found that it was a "close issue," and simply stated that "[o]n the facts of the case, we do not believe the Tennessee Supreme Court would sustain an award of punitive damages against Mr. Ritter." Womack v. Gettelfinger, 808 F.2d 446, 454 (6th Cir. 1986), Appendix A, P. 14. Yet, Judge Nelson did

not in form or in substance adhere to Tennessee's standard for a trial judge's disposition of these motions or Tennessee's standard for appellate review of a trial judge's discretion in not granting these motions.

The Sixth Circuit panel upheld the award of petitioners' compensatory damages but reversed the jury's award of punitive damages by its own standard. Womack v. Gettelfinger, 808 F.2d at 456, Appendix A, pp. 18-19.

It is from this reversal of the jury's award of punitive damages that Petitioners respectfully seek review.

REASONS FOR GRANTING THE WRIT

I. —

The Constitution of the United States and this Court's holding in Erie R.R. Co. v. Tompkins, infra, and its progeny compels the Federal Courts in jury trials to apply state standards in determining whether to grant motions for directed verdict or in the entering of judgments notwithstanding the verdict in diversity cases.

While recognizing that the Courts of Appeals were not in agreement, this Court in Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959) expressly left open the decision as to which standard should be applied when jurisdiction rested on diversity of citizenship. Dick v. New York Life Ins. Co., 359

U.S. at 444-45, 79 S.Ct. at 926, 3 L.Ed.2d at 941.

Therefore, this Court has not determined whether, in a diversity case, when ruling on a motion for a directed verdict or in ruling on a motion for judgment notwithstanding the verdict, a federal court may apply a federal test for the sufficiency of the evidence presented at trial or whether the principles established by this Court in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938), require the federal courts to apply the standards of state law. See, generally, 5A J. Moore and J. Lucas, Moore's Federal Practice, ¶50.06 (1986).

Yet Judge Nelson, in writing for the Sixth Circuit Court of Appeals, established a new federal standard to be applied in diversity jury trial cases for a federal trial judge's determination of the sufficiency of the evidence in deciding whether to grant a directed verdict and in deciding whether to grant a judgment not withstanding the verdict. Essentially, Judge Nelson now mandates that federal trial judges, under penalty of reversal, re-weigh the evidence themselves, assess the credibility of the witnesses, and utilize a preponderance of the evidence test in determining what shall constitute sufficient evidence for not granting a motion

for directed verdict nor the entering of a judgment notwithstanding the verdict.

After reweighing the evidence de novo without any presumptions or inferences in favor of the nonmoving parties (petitioners), Judge Nelson found the respondent's direct examination of its witnesses to be the most credible. Judge Nelson then relied on this testimony, found the case to be a "close one," and reversed the Tennessee trial judge's finding that there was "great evidence" to support the submission of punitive damages to the jury. This approach is wholly contrary to the Tennessee state law standard.

In Tennessee, the standards to be applied by a trial court judge in determining whether to grant a directed verdict or in deciding whether to enter a judgment notwithstanding the verdict are the same. Holmes v. Wilson, 551 S.W.2d 682 (Tenn. 1977). That standard, or test, requires that trial judge to

> ...take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.

Holmes v. Wilson, 551 S.W.2d at 685. The Tennessee Courts of Appeals are persistent in holding trial court judges to this standard. In Potter v. Tucker, 688 S.W.2d 833 (Tenn. 1985), the Court of Appeals further noted that a motion for directed verdict must be denied where there is "...any dispute as to any material determinative evidence..." Potter v. Tucker, 688 S.W.2d at 835 (emphasis added).

Additionally, in Tennessee the Courts of Appeals are held to the same standards as the trial courts in reviewing the lower court's discretion in ruling on motions for directed verdict and judgments not withstanding the verdict. Holmes

v. Wilson, 551 S.W.2d at 685. 24 Tenn. Juris., Verdicts, §24. Furthermore, "[n]either the trial judge nor the reviewing court is privileged to weigh the preponderance of the evidence when passing upon a motion for a directed verdict or for a judgment n.o.v." Holmes v. Wilson, 551 S.W.2d at 685. Also, the trial court nor appellate court on review is to determine the credibility of the witnesses at trial.

The standards and restrictions to be applied by the Federal Courts of the Sixth Circuit in diversity cases, until the opinion written by Judge Nelson, was thought to be those of the states. Toth v. Yoder Co., 749 F.2d 1190 (1984). Yet

Judge Nelson's new federal standard is materially different from that which constrains the Tennessee Courts. Because of the clear outcome-determinative effect that the choice in standard presents, denial of petitioner's right to the judicial application of the state law standards, as a matter of substantive law, is thus a violation of this Court's holding in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938), and its progeny. Judge Nelson spends pages of judicial ink, painstakingly weighing the evidence, concluding the whole accident could be explained by a mere "momentary lapse in judgment" by the truck driver and that

Gettelfinger Farms did not deserve punitive damages for its entrustment of the tractor trailer to Mr. Ritter. In so finding, Judge Nelson did not consider that under the state's standard as applied by the trial judge in Tennessee the accident could just as easily be explained (and supported by the evidence) to be a result of not only the gross negligence of the respondent Gettelfinger Farms and its driver respondent Ritter, but also a result of intentional violation of federal safety regulations and state law.

Consequently under Erie, the state court standard is required and would support a reversal of the Court of Appeals and a

reinstatement of the trial court judgment of punitive damages.

II.

> Even if the Federal Courts are to apply a federal standard in determining whether to grant motions for directed verdict and in entering judgments notwithstanding the verdict, the new federal standard created by Sixth Circuit Judge Nelson is in violation of the Seventh Amendment of the United States Constitution.

The evidence and testimony at trial and the version contained in Judge Nelson's opinion after he had reweighed the evidence bespeak of two different fact scenarios.

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty

> dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law.

In short, "[t]he Seventh Amendment forbids appellate judges to sit as post-trial assessors and denies them the power to vacate awards because they might, as fact-triers, have decided differently" Dunn v. Sears, Roebuck & Co., 639 F.2d 1171, 1175 (5th Cir. 1981). See Lucus v. American Manufacturing Co., 630 F.2d 291, 293 (5th Cir. 1980) (in light of the Seventh Amendment an appellate court should proceed cautiously when asked to set aside a jury verdict).

In those circuits where a federal standard is applied to diversity cases, the standard is clear. That is, both the trial judge and the appellate courts are to apply the same standard in making a decision on a motion for directed verdict as for j.n.o.v. Powell v. J.T. Posey Co., 766 F.2d 131 (3rd Cir. 1985), Hersch v. United States, 719 F.2d 873 (6th Cir. 1983). As a guideline for the Appellate Courts, it is well settled that evidence may not be re-weighed and the jury verdict may not be set aside merely because the appellate judges could have drawn different inferences or conclusions from the evidence or feel that other results are more reasonable

or preferable. Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108, 83 S.Ct. 659, 9 L. Ed 2d 618 (1963); Sentilles v. Carribean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, 4 L. Ed 2d 142 (1959).

Applying a federal standard of review, the most an appellate court can do is to determine whether there was any competent and substantial evidence in the record which fairly tends to support the verdict. Mortensen v. United States, 332 U.S. 369, 645 S.Ct. 1037, 88 L. Ed. 1331 (1944). Furthermore, an appellate court will not overturn a jury's verdict even though contradictory evidence was presented, if there is an evidentiary basis for the verdict.

Basham v. Pennsylvania R.R. Co., 372 U.S. 699, 83 S.Ct. 965, 10 L. Ed.2d 80 (1963); Lavender v. Kurn, 327 U. S. 645, 66 S.Ct. 740, 90 L. Ed. 916 (1946).

The right to jury trial on the issue of punitive damages and the right of a plaintiff to have the issue of damages, whether compensatory or punitive, decided by a jury, devolves from the Seventh Amendment. It is only in the case where the amount awarded by a jury appears to be so excessive as to be unconscionable and to arise from bias, passion, or prejudice that appellate courts may consider it appropriate to intervene. Adams v. Ford Motor Credit Co., 556 F.2d 737 (5th Cir. 1977).

Instead of focusing upon the facts clearly meriting submission to the jury of the issue of punitive damages under Tennessee law, Judge Nelson, in writing for the Sixth Circuit Panel, re-weighed the evidence and then discounted or ignored the plaintiff's (petitioner's) proof as to the intentional acts of the respondents. This "new" finding of fact is in complete contradiction to the proof at trial and such actions by the Sixth Circuit violate the tenets of the Seventh Amendment.

III.

Judge Nelson for the Sixth Circuit Court of Appeals has failed to apply state law of punitive damages in review of the diversity action below.

The decision as rendered by Judge Nelson has caused judicial destruction of claims for punitive damages under state law in diversity cases. Repugnant to even the most centralist viewpoint of federalism, Judge Nelson has seen fit to apply his own standard for punitive damages awards rather than the state law standard (in this case, Tennessee's) mandated by this Court's holding in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed 1188 (1938), and its progeny.

> The federal court enforces the state

> created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a state created right in a diversity case is, as we said in Guaranty Trust Company v. New York, 326 U.S. 99, 108, 65 S.Ct. 1464, 89 L.Ed 2079, 2086, 160 A.L.R. 1231, in substance 'Only another court of the state.' The federal court therefore may not 'substantially affect the enforcement of the right as given by the State.' Id. 326 U.S. 109.

Bernhardt v. Polygraphic Company of America, 350 U.S. 198, 100 L.Ed 199, 76 S.Ct. 273 (1937); see also Hanna v. Plumer, 380 U.S. 460, 14 L.Ed 2d 8, 85 S.Ct. 1136 (1965);

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 2 L.Ed 2d 953, 78 S.Ct. 893 (1958).

To be sure, punitive damages, in view of recent trends in the so called "liability crisis" are a sensitive area in the law. Many commentators have sought to stem the flow of punitive damages that plaintiffs would otherwise receive, but not Tennessee courts. To obtain punitive damages in Tennessee, the plaintiff need only satisfy a low threshold requirement. Thus, punitive damages

> ...are awarded in cases involving fraud, malice, gross negligence or oppression, Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557

> (1899); or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligations, Stepp v. Black, 14 Tenn. App. 153 (1931); or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences. Honaker v. Leonard, 325 F.Supp. 212 (E.D. Tenn. 1971).

Inland Container Corp. v. March, 529 S.W.2d 43, 45 (Tenn. 1975) (emphasis added); Smith v. Tri-County Electrical Membership Corp., 689 S.W.2d 181, 185 (Tenn. App. 1985).

It should be noted that this broad standard for an award of punitive damages is written in the disjunctive. That is in Tennessee an award of punitive damages is proper, as an example, upon a

finding of mere conscious indifference to the consequences of one's actions. InterCity Trucking Company v. Daniel, 181 Tenn. 126, 178 S.W.2d 756 (1944); Sakamoto v. N.A.B. Trucking Co., Inc., 717 F.2d 1000 (6th Cir. 1983) (applying Tennessee law of punitive damages). 27 Tenn. L.Rev. 381-382 (1960).

Thus, Tennessee has a low threshold, but it is the unmistaken public policy of the State of Tennessee. Furthermore, it is wholly unpalatable for the Sixth Circuit to compromise these notions of Tennessee justice. Yet this is what has happened.

The Sixth Circuit, has erroneously decided that there ought to be a mens rea requirement to

support an award of punitive damages in Tennessee. Judge Nelson, makes this conclusion, based on an earlier decision by the Sixth Circuit using Arkansas law. Womack v. Gettelfinger, 808 F.2d at 452, Appendix A, p. 10. In that case, the Court stated "the most recent construction of Arkansas law . . . ruled that punitive damages were only available when 'the defendant acted wantonly or with such a conscious indifference to the consequences that malice might be inferred'. . . It is well established in Arkansas that negligence, even gross negligence, does not suffice for an award of punitive damages." Williams v. Union Carbide Corp., 790 F2d 552,

556-557 (6th Cir. 1986). Tennessee, however, clearly allows an award of punitive damages for conduct that amounts to gross negligence. Inland Container Corp. v. March, 529 S.W.2d 43 (Tenn. 1975); Bryson v. Bramlett, 204 Tenn. 347, 321 S.W.2d 555 (1959).

In attempting to reach his desired result, Judge Nelson even tries to distinguish types of gross negligence wherein an act may be sufficiently grossly negligent to bar a claim for contributory negligence but not grossly negligent enough to support punitive damages. This distinction is not supported in any Tennessee decision, but is used by Judge Nelson in an attempt to explain

away Tennessee case law. See Womack v. Gettelfinger, 808 F.2d at 452-453, Appendix A, pp 10-14, citing, Intra-City Trucking Co. v. Daniels, 181 Tenn. 126, 178 S.W.2d 756 (1944); Garner v. Maxwell, 360 S.W.2d 64 (Tenn. App. 1961); Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962). Also, Judge Nelson fails to acknowledge the close parallel, factually and legally, between the present case and Sakamoto v. N.A.B. Trucking Co., Inc., 717 F.2d 1000 (6th Cir. 1983) (applying Tennessee law). In Sakamoto, the appellate court stated that it must be constrained to respect the Tennessee trial judge's ruling in the state law issue concerning

punitive damages. Sakamoto, 717 F.2d at 1003.

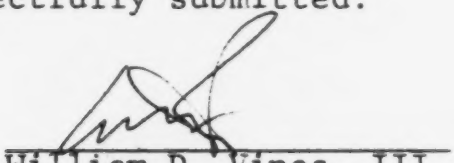
In conclusion, Judge Nelson, in writing for the Sixth Circuit overlooked the experienced trial judge's application of Tennessee law and has now mandated that a defendant must possess intense culpability and a bad motive in order to justify an award of punitive damages in Tennessee, even though the clear Tennessee law on the issue makes no such requirement. Furthermore, Judge Nelson cites no Tennessee law to indicate an express or implied trend to make the threshold of punitive damages awards higher.

CONCLUSION

Petitioners would welcome the opportunity to submit to this Court

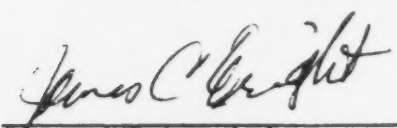
further briefs on any of the issues above. We respectfully conclude that the writ of certiorari be granted.

Respectfully submitted.



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May 18, 1987

APPENDIX A

District Court #83-650
83-649

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-5613, 84-5614, & 84-5651

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANCES LOLA WOMACK,
Plaintiff-Appellee (84-5613),

and

JAMES A. CHANDLER, et al.,
Plaintiffs-Appellees (84-5614),

v.

DONALD J. GETTELFINGER, et al.,
Defendants/Third-Party Plaintiffs-Appellants,

v.

RONALD D. KENNEDY, et al.,
Third-Party Defendants-Appellees (84-5651).

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed December 29, 1986

Before: JONES and NELSON, Circuit Judges; and PECK, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. At 6:30 in the morning of October 14, 1983, defendant Charles S. Ritter, a rela-

tively inexperienced truck driver operating a tractor-trailer owned by defendant Gettelfinger Farms, entered a two lane state highway from the driveway of a restaurant in rural Tennessee. The highway ran north-south, and Mr. Ritter approached it from the west side. Keeping the rear wheels of his trailer in sight in his rear view mirror, and taking care that they did not go into a ditch that was present at the side of the driveway, Mr. Ritter made a wide right turn, swinging onto the shoulder at the far side of the road. He intended to pull into the southbound lane at the completion of his turn.

Third-party defendant Ronald D. Kennedy, driving his automobile north on the highway, saw the headlights of the truck pointing toward him from the shoulder. It was still dark, and there was a very heavy fog. Confused by the position of the oncoming truck headlights, and failing to see the trailer angled across the road, Mr. Kennedy drove into the side of the trailer. One of his passengers, William Sidney Womack, was killed, and another passenger, plaintiff James A. Chandler, was injured.

Mr. and Mrs. Chandler and Mr. Womack's widow brought federal court diversity actions against Mr. Ritter and Gettelfinger Farms, seeking compensatory and punitive damages. The defendants filed third-party complaints against Mr. Kennedy and against Joe R. and Linda Woods, the operator and owner, respectively, of an automobile that hit the Kennedy car some minutes after the initial accident.

The two original actions were tried to a jury, and after defense motions for a directed verdict as to punitive damages had been denied, Mrs. Womack and Mr. and Mrs. Chandler recovered judgments against Mr. Ritter and Gettelfinger Farms for compensatory damages totaling $610,963.02 and punitive damages totaling $1,250,000. The magistrate before whom the case was tried then entered summary judgment against Gettelfinger Farms and the truck driver on their third-party claims for contribution or indemnity and for damage to the tractor-trailer. The magistrate held that these claims

were barred by the jury's finding that the defendants had been guilty of conduct warranting the award of punitive damages. While the case was on appeal, Mr. and Mrs. Woods entered into a $2,500 settlement with Mrs. Womack and obtained a release of liability from her. On the strength of this release, the Woods have moved for dismissal of the appeal of the summary judgment as to them on mootness grounds, the third-party complaint in the Chandler case having been dismissed by agreement prior to trial.

The central issue presented on appeal is whether the magistrate erred in submitting the claim for punitive damages to the jury and in overruling a motion for judgment notwithstanding the verdict on the punitive damage issue. The question is a close one, but we have concluded that the Tennessee courts probably would not permit an award of punitive damages under the circumstances of this case. We shall therefore reverse both the judgment for the plaintiffs, insofar as it awards punitive damages, and the summary judgment for the third-party defendants.

I

The rig that Mr. Ritter was driving consisted of a 1979 Mack cab-over tractor, with manual transmission and five forward gears, and a refrigerated trailer 42 feet in length. Gettelfinger Farms, a trucking concern, turned the rig over to Mr. Ritter on September 29, 1983, when he started work for Gettelfinger Farms as a probationary employee. Mr. Ritter had driven the tractor-trailer for several thousand miles by the time of his accident, picking up and discharging loads of perishable food products at various points in Mississippi, Texas, Michigan, Tennessee, Ohio and Kentucky.

On the evening before the accident Mr. Ritter was driving east on Interstate Route 40 in Tennessee, hauling a full load of food products that he was supposed to deliver in New Jersey the following afternoon. He testified that he pulled off the road at about 9 p.m., having encountered thick fog, and

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spent the night sleeping in his cab. As is customary, the diesel engine of his truck and the diesel-powered refrigerator unit on his trailer were left running. Mr. Ritter got up a few minutes before 6 a.m., made a safety check, and noted that the fuel gauge on the refrigeration unit's diesel fuel tank registered only one-eighth full. Although it was still foggy, Mr. Ritter resumed his journey, keeping an eye out for a place to refuel. Having noticed a billboard advertisement for a truck stop that he assumed would be at the next exit, as he testified, Mr. Ritter took that exit and drove north for a short distance on Tennessee State Route 95.

Seeing a lighted restaurant at the right hand side of the road, Mr. Ritter parked his truck on the shoulder of the road, still pointing north, and went into the restaurant to ask where he could buy fuel. He was told that he would have to turn around and go back in the direction from which he had come.

Mr. Ritter testified that he then went back to his truck, turned off his "four-way flashers" (both turn signals on the tractor and on the trailer), signaled for a left turn, and pulled onto the road. Because he was going very slowly, looking for a place to turn around, he testified that he put his flashers back on.

About two-tenths of a mile farther on Mr. Ritter saw another restaurant, this one on the left side of the road. The restaurant had a paved driveway and parking area. Mr. Ritter made a left turn into that driveway, looped around in the parking lot, and stopped his truck before reentering the highway. He testified that he looked both ways, saw nothing coming, and pulled out onto the road to begin his turn to the right. He was operating in low gear at half throttle.

Looking down to his right, Mr. Ritter saw a ditch at the side of the driveway. He wanted to make sure that his rear wheels did not slip into the ditch, which might have caused his loaded trailer to flip over on its side, so he made a wide turn, pulling onto the shoulder at the far side of the road.

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He kept the right rear wheels of his trailer in sight in his mirror, to make sure he was keeping the wheels away from the ditch. The fact that the tractor did not have power steering may have led him to make his turn even wider than it would have been otherwise.

As Mr. Ritter was maneuvering onto the road, Mr. Ronald Kennedy, an iron worker at a local construction project, was driving north in a Ford Escort automobile. Two fellow iron workers, Mr. Womack and Mr. Chandler, were passengers in the car; Mr. Chandler was in the front seat, and Mr. Womack was dozing in the back. Mr. Kennedy's car was equipped with halogen fog lights, and it was going about 35 miles an hour.

Rounding a slight curve to the south of the restaurant, Mr. Kennedy saw the headlights of the truck about 400 or 500 feet away. Surprised at the position of the headlights, Mr. Kennedy made a comment about them to Mr. Chandler. Mr. Chandler responded "It looks like he is on our side [of the road]" and then said "No, he is over to our right." Mr. Kennedy agreed, saying "Yeah, he is sitting on the shoulder of the road." Neither man saw the trailer angled across the road until it was too late to stop. Mr. Kennedy had taken his foot off the accelerator, slowing down to about 25 miles per hour, but did not see the trailer until he was past the headlights of the tractor. Mr. Kennedy swerved to the left just before the impact, but could not avoid hitting the trailer. The driver of the truck, Mr. Ritter, (concentrating, perhaps, on his rear wheels and the ditch) did not see the oncoming automobile in time to flash his lights, sound his horn, or otherwise signal Mr. Kennedy to stop. There was evidence from which the jury could reasonably have inferred that the truck's four-way flashers were not on. The truck was equipped with a reflectorized triangle, but Mr. Ritter had not set it out before starting his turn. There was testimony from a state official, Ronald Stanley, the triangle would have done no good in the fog. Flares would have been visible, but Gettelfinger Farms did

not equip its trucks with flares and was not required to do so by government regulations.

Mr. Stanley, the state official, happened on the scene just after the accident. Driving south on State Route 95 at a speed of 30 to 40 miles per hour, and seeing the back of the trailer sitting on the road, Mr. Stanley eased his patrol car around it. (He had no trouble stopping in time.) When he saw there had been a collision, Mr. Stanley parked on the shoulder of the southbound lane and turned on his flashing blue lights. Mr. Ritter, who had stopped his truck after the impact and jumped out of his cab, asked Mr. Stanley if he should move the truck out of the road. Mr. Stanley told him to do so. Mr. Ritter then backed up a foot or two, disengaging the trailer from the Kennedy car, and pulled the entire rig onto the shoulder of the northbound lane. He left his lights on, as Mr. Stanley told him to.

Some ten or fifteen minutes after the accident, Mr. Joe R. Woods, driving his car north on State Route 95 at around 30 or 35 miles per hour, saw the headlights of the truck on the shoulder to his right and the blue lights of the patrol car on the opposite shoulder. He did not see the Kennedy vehicle in the middle of the road until he had gone past the headlights of the truck. He slammed on his brakes when he saw the Kennedy car, but could not avoid hitting it. Mr. Womack was still in the car.

Mr. Ritter subsequently admitted that he had caused the accident because he had been blocking the road. Mr. Ritter said he "was going to jail," but in fact he was only fined $10 plus court costs for failure to yield the right-of-way.

An experienced truck driver who testified as an expert witness on behalf of the plaintiffs told the jury that although he did not believe Mr. Ritter should have been put in prison, it was very dangerous for him to have pulled out onto the far side of the road in the fog without using flares. There was some suggestion that it would have been possible to make

the turn without going much over the center line, in which event flashing lights would have provided all the warning necessary, but the main thrust of the testimony was that Mr. Ritter ought to have remained in the restaurant parking lot until the fog had lifted.

Extensive evidence was also presented on Mr. Ritter's lack of experience as a truck driver and on the failure of Gettelfinger Farms to investigate his qualifications before hiring him. Mr. Ritter, a married man in his early thirties, had a 9th grade education and had spent fifteen years working in service stations and at odd jobs. He had a long-time friend named Larry Goode, a truck driver by trade, who had allowed Mr. Ritter to ride with him, off and on, for several years, and who had worked with Mr. Ritter to teach him to drive a truck. Federal regulations require that anyone in the cab of a truck "be certified and capable of driving," according to Mr. Goode's testimony, and in 1981 Mr. Goode had signed a certificate of qualification attesting to Mr. Ritter's ability to drive. Mr. Goode subsequently gave Mr. Ritter a second certificate, with an expiration date subsequent to the date of the accident. Mr. Goode let Mr. Ritter drive a total of between 700 and 1000 miles over a period of about three months prior to the accident in 1983. Mr. Goode sometimes slept while Mr. Ritter was driving. Both men had log books, and when Mr. Goode drove more than the legal limit, the excess time would apparently be logged to Mr. Ritter. Mr. Ritter would take over the driving when the men approached weigh stations where log books might be checked.

In 1982 Mr. Goode got Mr. Ritter a job spotting trailers at a General Electric facility, but other drivers had to help Mr. Ritter do the work and he was soon released from the job.

In August of 1983 Mr. Ritter applied for a job at Victory Freightways and was given a road test, which he failed. The person who administered the test could not remember the reason Mr. Ritter did not pass the test, but Mr. Ritter testified

that it was because he missed a gear in shifting gears on a tractor that had a number of forward speeds.

Two months later both Mr. Goode and Mr. Ritter went to Gettelfinger Farms and filled out job applications. Mr. Gettelfinger testified that Mr. Goode told him Mr. Ritter, although short on experience, could safely handle a tractor-trailer, but Mr. Goode testified that no such conversation occurred, that he did not feel Mr. Ritter was qualified, and that he had lied when he certified Mr. Ritter as qualified. There is also a conflict in the evidence as to whether the men were given written open-book examinations before being hired.

Both men were called to work at the same time, and each man was given a truck to drive. No road tests were administered as far as they knew, but Mr. Gettelfinger testified that he followed Mr. Ritter in a pickup truck for 10 to 15 miles to check on Mr. Ritter's driving. Mr. Goode disputed this. It is clear, in any event, that Mr. Ritter drove the Gettelfinger truck for several thousand miles prior to the accident; that he and Mr. Goode "ran together" during the first week or ten days of their employment, staying no more than twenty miles apart from one another; and that Mr. Ritter had no mishap during that time. He did have a minor accident the day before the collision with which we are concerned here; it was occasioned, he testified, by someone cutting too sharply in front of him and then stopping at a red light.

Some weeks after the major accident Mr. Ritter had an accident in Texas. He told Gettelfinger and the state troopers that a deer had run in front of him, but Mr. Goode testified that Mr. Ritter said he had really fallen asleep at the wheel.

The punitive damage claims against Gettelfinger Farms were submitted to the jury under the theory of respondeat superior (as is permissible, under Tennessee law, where the agent's conduct would justify a punitive damage award against the agent) and under the theory that the accident had

been caused by gross negligence in the entrustment of the truck to an incompetent driver. The jury's verdict was a general one, making it impossible to tell which theory (or theories) the jury accepted in assessing punitive damages against Gettelfinger Farms as well as against the truck driver.

II

Summarizing Tennessee case law going back to the last century, the Tennessee Supreme Court has said that punitive damages

> "are awarded in cases involving fraud, malice, gross negligence or oppression, *Knoxville Traction Co. v. Lane,* 103 Tenn. 376, 53 S.W. 557 (1899); or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligations, *Stepp v. Black,* 14 Tenn. App. 153 (1931); or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences. *Honaker v. Leonard,* 325 F.Supp. 212 (E.D. Tenn. 1971)." *Inland Container Corp. v. March,* 529 S.W.2d 43, 45 (Tenn. 1975).

It is only in cases involving this kind of egregious misconduct that punitive damages may be awarded. *Johnson v. Husky Industries, Inc,* 536 F.2d 645, 650 (6th Cir. 1976); *Cathey v. Johns-Manville Sales Corp.,* 776 F.2d 1565, 1570 (6th Cir. 1985), *cert. denied* _ U.S. _, 92 L.Ed.2d 740 (1986). Intended to inflict punishment on the wrongdoer rather than to make the injured party whole (which is what compensatory damages are supposed to do, insofar as possible), punitive damages are based "upon the oppression of the party who does the injury." *Cathey,* 776 F.2d at 1570, citing *Lazenby v. Universal Underwriters Insurance Co.,* 214 Tenn. 639, 642, 383 S.W.2d 1, 4 (1964). Tennessee views punitive damages as "private fines," *Dykes v. Raymark Industries, Inc.,* 801 F.2d 810, 814 (6th Cir. 1986), citing *Huckeby v. Spangler,* 563 S.W.2d 555 (Tenn. 1978), and this quasi-criminal pun-

ishment is not to be imposed for mere negligence or want of care. To do so—particularly when the dollar amount of the "fine" is measured in the millions—could raise "important issues" under the United States Constitution. See *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. __, __, 89 L.Ed.2d 823, 837 (1986).

The standards for determining whether the wrongdoer's conduct is sufficiently oppressive to justify an award of punitive damages have been characterized as "confusing and devoid of any effective definition." Sales & Cole, "Punitive Damages: A Relic That Has Outlived Its Origins," 37 Vand.L.Rev. 1117, 1137 (1984). Unless the federal courts are prepared to hold punitive damages unconstitutional, however, or hold that they cannot be imposed without according the defendant some or all of the safeguards peculiar to criminal proceedings—neither of which courses is urged on us here —federal courts must apply the state-created standards as best they can, limiting any recovery to compensatory damages where liability is based on garden-variety negligence (see, *e.g., Williams v. Union Carbide Corp.*, 790 F.2d 552 (6th Cir. 1986), applying Arkansas law), and permitting the jury to consider awarding both punitive and compensatory damages where the defendant's misconduct manifests the kind of *mens rea* that makes it reasonable for the government not only to require payment of full compensation, but to exact retribution as well.

The two Tennessee decisions that come closest to suggesting Mr. Ritter could properly be found guilty of gross negligence or reckless misconduct in the case at bar are *Inter-City Trucking Co. v. Daniels*, 181 Tenn. 126, 178 S.W.2d 756 (1944) and *Garner v. Maxwell*, 360 S.W.2d 64 (Tenn. Ct. App. 1961). Both cases involved trucks that were left parked on the highway at night, without adequate warning devices, while the drivers took their ease elsewhere. In each instance the truck driver was guilty of more than a momentary lapse of judgment, and in neither case did punitive damages, as such, play a significant role in the decision.

Daniels was a wrongful death case in which the decedent's widow recovered judgment, after a $2500 remittitur, for $6000. There was no award of punitive damages; only because of the defendant trucking company's attempt to rely on a contributory negligence defense did the question of "gross negligence" on the part of the truck driver arise. Under Tennessee law, contributory negligence on the part of the plaintiff's decedent would have meant that the widow and her three minor children could have recovered nothing—not even the modest compensatory damages awarded in the trial court—unless the truck driver (who, incidently, had no driver's license) could be said to have been guilty of gross negligence. Perhaps it is not too surprising that the Tennessee Supreme Court was able to discern gross negligence. In the first place, the truck driver had been guilty of negligence per se in failing to comply with a Tennessee statute requiring three lighted flares or pot torches to be placed around a vehicle parked on the highway at night. The truck driver did claim to have set out the required pot flares, but instead of standing by to keep them burning, he went into town to seek comfort and protection from the cold and remained away for at least an hour and a half. The flares (if they had been placed at all) went out, and the plaintiff's decedent was killed as a result. Likening the truck driver's attitude to that of a person who is guilty of criminal negligence, the court allowed the $6000 compensatory damage award to stand.

In *Garner v. Maxwell*, 360 S.W.2d 64, *supra*, a truck driver had left his disabled tractor-trailer outfit parked on the highway, at night, for about four hours. The truck driver had turned off the lights of the truck to save the battery and had gone home to bed, leaving the rig unattended and without the statutorily required three flares or three reflectors. The truck driver made no effort to employ a wrecker to get the tractor-trailer off the highway. A member of the Tennessee Highway Patrol ran his automobile into the tractor-trailer at about 12:30 a.m. A jury returned a verdict awarding the patrolman $21,000 for compensatory damages and $400 for

PUBLISHER'S NOTE :

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radioed to the tower operator that he was "having trouble" with the ADF and that he "didn't pick up the outer marker," a ground radio facility which would indicate his location. The plane then flew approximately 20 miles beyond the airport and crashed into the side of Holston Mountain, killing the plaintiff's decedent.

The Tennessee Supreme Court held there was sufficient evidence to support the jury's verdict that the defendant airline was "guilty of negligence in respect of the condition of its plane and the manner of its operation," *id.* at 662, 355 S.W.2d at 446, but also held that there was "no evidence that [the defendant] was guilty of such gross and wanton negligence as to justify any award for punitive damages." *Id.* at 664, 355 S.W.2d at 446-47. In setting aside an award of punitive damages in the relatively modest amount of $5,000, the court said that

> "While petitioner's (defendant's) pilot and First Officer were negligent in undertaking to fly a plane not airworthy, and in their manner of operation of the plane, there is nothing to show such gross and wanton negligence on their part as to evince conscious indifference to consequences. It must be remembered that their own lives were at stake, and they evidently expected to make a safe landing."

Id. at 665, 355 S.W.2d at 447.

So it was in the present case; in undertaking to pull out onto the highway in the fog, risking injury to himself and damage to the truck, Mr. Ritter evidently expected to make a safe turn. His negligence was not so gross or wanton as to evince conscious indifference to the consequences of his action. On the facts of this case, we do not believe the Tennessee Supreme Court would sustain an award of punitive damages against Mr. Ritter.

III

Insofar as the award of punitive damages against Gettelfinger Farms is concerned, our conclusion that Mr. Ritter was

not guilty of gross or wanton negligence means that his employer cannot be held liable for punitive damages on a respondeat superior theory. Conceptually, however, gross negligence in the entrustment of the tractor-trailer to a known incompetent could justify an award of punitive damages even without gross negligence on the part of the driver himself. See Tenn. Code Ann. § 20-9-502 (1980); *Tracy v. Finn Equipment Co.*, 290 F.2d 498 (6th Cir.), *cert. denied*, 368 U.S. 826 (1961). On the record of this case, we do not believe that the negligence of Gettelfinger Farms in entrusting its truck to Mr. Ritter can support an award of punitive damages.

Evidence presented at trial indicated that Mr. Ritter was not properly certified to drive the truck. The jury reasonably could have found that Mr. Ritter did not pass either the required road test or a written test prior to his employment by the Gettelfingers. Mr. Ritter did, however, present a competency certificate signed by Mr. Goode, an experienced driver, and the fact that Mr. Ritter drove the Gettelfinger truck for several thousand miles without significant incident shows that Mr. Ritter did, in fact, know how to drive. The accident in this case did not result from inability to shift gears or maneuver the truck; it resulted from a lapse of judgment that no pre-employment test would have been likely to predict. Negligent though Gettelfinger Farms may have been in hiring Mr. Ritter, the entrustment of a $200,000 tractor-trailer to an apparently responsible driver does not bespeak the kind of wanton misconduct necessary to support a punitive damage award.

IV

Rejecting two subsidiary claims advanced by the defendants, we do not find the compensatory damage awards excessive, nor do we believe that the district court abused its discretion in failing to grant the defendants a continuance. We shall therefore affirm the judgment of the district court insofar as it awards compensatory damages against Mr. Ritter and Gettelfinger Farms.

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V

The magistrate granted the third-party defendants' motions for summary judgment in the third-party action against Mr. Kennedy and Mr. and Mrs. Woods because, under Tennessee law, "[t]here is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death." Tenn. Code Ann. § 29-11-102(c) (1980). Equating gross negligence with intentional infliction of injury or death, the magistrate held that this statutory provision precludes grossly negligent tortfeasors from obtaining contribution or indemnity. We need not address that issue, having determined that as a matter of law the third-party plaintiffs were not guilty of gross negligence. Simple negligence does not bar contribution or indemnity among joint tortfeasors.

As the magistrate has held, the third-party plaintiffs may not recover for damage to the truck. Although it is unclear whether federal or state collateral estoppel rules should be applied in determining the preclusive effect, in the third-party action, of the negligence finding in the trial of the wrongful death and personal injury actions, Tennessee and federal law would dictate the same result here. In cases governed by federal law, collateral estoppel may clearly be invoked in situations such as that presented here. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). Although the Tennessee Supreme Court has not precisely so ruled, it has indicated in dicta that it would follow the rationale of the Supreme Court (and the courts of other states) in holding that collateral estoppel may be used defensively by one who was not a party to the prior suit. See *Cotton v. Underwood*, 223 Tenn. 122, 131-32, 442 S.W.2d 632, 637 (1969); see also *Fourakre v. Perry*, 667 S.W.2d 483 (Tenn. App. 1983). Whether federal law or Tennessee law is applied, therefore, the third-party plaintiffs in this case are collaterally estopped from relitigating the issue of their own negligence. "Under Tennessee law contributory negligence is

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ordinarily a complete bar to a plaintiff's recovery." *McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127, 136 (Tenn. App. 1982). Therefore, because the accident was found to have been caused by the third-party plaintiffs' negligence, Gettelfinger Farms is precluded from recovering from Mr. Kennedy for damage to its tractor-trailer.

VI

Finally, Mr. and Mrs. Woods have moved to dismiss the appeal as to them on the basis of their settlement agreement with Mrs. Womack. Tennessee Code Annotated § 29-11-105 (1980) provides.

> "(a) When a release or covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor."

In order for the Woods to be protected, under this statute, against a claim for contribution, the release must have been "given in good faith." The third-party plaintiffs contend that the release in this case was not given in good faith. As evidence of that fact, they point out that although Mrs. Womack was awarded $175,963.02 in compensatory damages and $500,000 in punitive damages, the settlement with the Woods was in the amount of only $2,500. Moreover, that

settlement was entered into after entry of judgment, when the damage amounts were already determined.

Whether a release was given in good faith is a question of fact to be determined first by the trier of fact. *Florow v. Louisville & Nashville Railroad Co.*, 502 F.Supp. 1 (M.D. Tenn. 1979). The magistrate will have an opportunity to consider this question on remand.

Because Tenn. Code Ann. § 29-11-105 does not govern indemnity, we must look elsewhere to determine whether the third-party plaintiffs may still assert a cause of action against the Woods for indemnity. In *Southern Railway Co. v. Foote Mineral Co.*, 384 F.2d 224, 226-27 (6th Cir. 1967), this court approved the following jury instruction:

> "Under the Tennessee law a person who is held liable for negligence to one party may be indemnified or may recover indemnity in the amount of his liability from a third-party, if he establishes that the third-party is also guilty of negligence proximately causing or contributing to the cause of the accident, and that the negligence of the third-party was active negligence while his own negligence was only passive."

The instruction went on to explain that if one joint tortfeasor was guilty of active negligence, he could not recover indemnity from the other tortfeasor. *Id.* at 226. If both were guilty of active negligence, however, one could recover *contribution* from the other. *Id.* at 226-27. (Contribution is not available, as noted above, where there has been a good faith release.)

Because the magistrate granted summary judgment in favor of the Woods on the basis that one found guilty of gross negligence is not entitled to indemnity or contribution, and thus did not consider the active/passive negligence issue, that issue, too, should be addressed by the magistrate on remand.

We AFFIRM the award of compensatory damages.

REVERSE the award of punitive damages, and REMAND the third-party action for further proceedings in accordance with this opinion.

APPENDIX B

No. 84-5613/5614/5651

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANCES LOLA WOMACK, INDIVIDUALLY AND AS SURVIVING SPOUSE OF WILLIAM SIDNEY WOMACK, DECEASED,

Plaintiff-Appellee,

v. (FILED 2/19/87)

DONALD J. GETTELFINGER d/b/a GETTELFINGER FARMS AND CHARLES S. RITTER,

Defendants-Appellants

BEFORE: JONES and NELSON, Circuit Jduges, and PECK, Senior Circuit Judge

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to

the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

[Signed: John Hehman]
John P. Hehman, Clerk

No. CIV-3-83-649
No. CIV-3-83-650

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE NORTHERN DIVISION

JAMES A. CHANDLER and wife, IVA I. CHANDLER, and HATTIE SUE KENNEDY,

Plaintiffs, (FILED 6/22/84)

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER, d/b/a GETTELFINGER FARMS, and CHARLES RITTER,

Defendants and Third-Party Plaintiffs,

v.

RONALD D. KENNEDY,

Third-Party Defendant,

and

RONALD D. KENNEDY,

Third-Party Plaintiff by Counterclaim,

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER, d/b/a

GETTELFINGER FARMS, and CHARLES RITTER,

Third-Party Defendants by Counterclaim

and

FRANCES LOLA WOMACK and HATTIE SUE KENNEDY,

Plaintiffs,

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER, d/b/a GETTELFINGER FARMS, and CHARLES RITTER,

Defendants and Third-Party Plaintiffs,

v.

RONALD D. KENNEDY, JOE R. WOODS and LINDA WOODS,

Third-Party Defendants,

and

RONALD D. KENNEDY,

Third-Party Plaintiff by Counterclaim

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER, d/b/a GETTELFINGER FARMS and CHARLES RITTER,

Third-Party Defendants by
Counterclaim

MEMORANDUM OF ORAL FINDINGS
AND CONCLUSIONS FROM THE BENCH

Before the Court is the motion of the Defendants for judgment notwithstanding the verdict of the jury or, alternatively, for a new trial or for remittitur. The undersigned has now had an opportunity to hear the arguments of counsel, to study the record as a whole and to read the respective post-trial memoranda submitted by counsel. The Defendant has raised approximately 12 points in support of its motion. I will try to deal with each of these briefly.

The Defendants claim that the undersigned should not have

submitted the question of whether or not Mrs. Gettelfinger was a partner to the jury. A motion for directed verdict on the point was made at the conclusion of all the proof. It appears from the pretrial order and III, Section C and D thereof, that the following stipulations were made:

> "Defendants Doris and Donald Gettelfinger, d/b/a Gettelfinger Farms, are citizens and residents of the State of Indiana. At all times material, Charles Ritter was acting within the course and scope of his employment with Gettelfinger Farms."

It appears from this stipulation that the Defendants admitted or stipulated to a principal and agency relationship between Mr. and Mrs. Gettelfinger and the Defendant

Charles Ritter in the pretrial order. Of course, the record was amended later to reflect the fact that Mrs. Gettelfinger's correct name is Yvonne and not Doris.

Furthermore, the undersigned is of the opinion that there was sufficient evidence to state a claim for jury consideration regarding Mrs. Gettelfinger's status as a partner.

The Defendant claims that the amount of punitive damages in excessive and that the award of punitive damages must be set aside because the Plaintiff did not introduce any evidence of the Defendants' financial worth. The undersigned is of the opinion that there was substantial evidence in

the record from which the jury could have concluded that punitive damages were warranted.

Furthermore, introduction of the financial worth of Defendants is a matter that is optional with the parties. It is not required in order that an award of punitive damages be approved. Odom v. Gray, 508 Southwest 2d 526 (Tennessee 1974).

Next, the Defendants object that the case should have been continued or that the severance which was granted should not have been granted. The undersigned is of the opinion that this is a matter of discretion as set forth in Rules 14(A) and 42(B) of the Federal Rules of Civil Procedure.

In this case, the Third-Party actions primarily concern indemnity and contribution with certain counter-actions for personal injuries and damages. In the case of Kosters v. Seven-Up, 595 Fed.2d 347 (Sixth Circuit 1979), the Court held in a products liability case that the trial judge acted within its discretion in severing the third-party claims for indemnity and contribution. The trial court was concerned that there would be a complexity of issues and jury confusion if that severance had not been granted. In the present case, the pretrial order listed 24 issues of fact and 11 issues of law in the case before third-party actions were severed. After the actions

were servered and the original action was tried, this case lasted almost two weeks. The Defendants were ready for trial when this case went to trial and the jury was apprised of the fact that the Defendants had sued other parites, and I don't see how the Defendants were prejudiced before the jury in this case by the fact that all the claims were not tried together. This ground will be overruled.

Next, the Defendants object that insurance, the question of insurance, was placed before the jury. Rule 411 of the Federal Rules of Evidence provides that evidence that a person was or was not insured against liability is not admissible upon the issue of

whether he acted negligently or otherwise wrongfully except in certain limited exceptions.

In this case, I think there are two reasons why this contention of Defendants must be overruled. First, the interrogatory asked the Defendants to state the name of the insurance carrier and coverage limits. The response noted was, "This information to be provided by Mr. Yancey." If the jury was able to see the response to the interrogatory and the interrogatory itself, I believe that that rather innocuous answer did not affect the substantial rights of the parties and would not be a basis for granting a new trial. Furthermore, the Defendants did not object to

the admission of the exhibit, and if it had done so or had requested to examine the exhibit before it was passed to the jury, they could have protected their rights. This ground will be overruled.

Next, the Defendants object that evidence of other accidents was admitted. I have stated my reasons for allowing that evidence in in an on-the-record, in-chambers conference which was held just before trial. It may be also that the Defendants have waived any objection to such accidents being admitted by their failure to make a contemporaneous objection at trial. In any event, I believe that the evidence was competent and not inadmissible.

Next, the Defendants object that certain incompetent evidence was received regarding a statement allegedly made by a dispatcher in the Defendant's employ. At trial, witness Larry Goode was asked by counsel for the Plaintiffs about what if anything he had been told as to what a person had to know to be able to drive a Gettelfinger truck. Mr. Goode started to answer the question, but Mr. Yancey objected on the ground that he did not know who the dispatcher was. At that point, the witness named a person and then I asked whether or not that person was an employee of Gettelfinger. The witness said "Yes." At that point, I said, "All right. You may proceed. Tell us

what he said." At that point, the witness testified, "He made a comment, 'If you can get out of the drive, you're hired,' and laughed about it." There was no motion to strike the evidence in accordance with Rule 103(a) (1) of the Federal Rules of Evidence. Furthermore, if the foregoing conversation between counsel and the Court and the witness could be interpreted as a question being posed to the witness by the Court, Rule 614 of the Federal Rules of Evidence provides that the Court may indeed ask questions of a witness and that if the parties have any objections thereto, they should make those objections known. No such objection appears on the record.

It therefore appears that the Defendants have waived any objections that they had to any such testimony. There is, therefore, no need to deal with the question of whether or not the statement was admissible as an admission of the party of proponent under Rule 801 of the Federal Rules of Evidence. This ground will be overruled.

The Defendant also claims that compensatory damages were excessive. The undersigned is of the opinion that this contention is clearly without merit.

The Defendants next object that the wrong mortality table was used, but no objection at trial was made to the use of such mortality

tables. Furthermore, it appears to the undersigned that there was no error in admitting the evidence as presented.

The Defendants next object that the undersigned did not give their tender charge on loss of profits. I specifically ruled at trial that the Plaintiff could not adduce such evidence before the jury and did not permit it. In fact, I excluded the testimony of their proffered expert witness on the subject. The charge tendered by the Defendants was, therefore, superfluous, and this contention is without merit.

Finally, the Defendants object to the undersigned's charge with respect to negligent entrustment.

In the undersigned's opinion, that charge correctly states the law of the State of Tennessee with regard to negligent entrustment.

Parties' motion to exceed the page limit for post-trial briefs are both hereby granted. It is further ordered that the Defendant's motion for judgment notwithstanding the verdict of the jury or alternatively for a new trial or for a remittitur be, and the same hereby is, denied.

As the Defendants correctly point out in their post-trial brief, to determine whether a damages award is excessive, the trial court must look at whether the award is clearly within the maximum limit of the reasonable

range. If the award is greater than the maximum amount that reasonably could be found, the Court must order a new trial or remittitur.

In this case, the Plaintiffs produced a great deal of evidence regarding why their position of punitive damages was appropriate should be sustained. The jury chose to believe that evidence, obviously. I cannot say that the verdict rendered was outside of the maximum limit of a reasonable range under the facts and circumstances of this case. To do so, in my opinion, would be an imposition upon the jury system itself.

File:

[Robert P. Murrian]

Robert P. Murrian

United States Magistrate

NO. CIV 3-83-649
NO. CIV 3-83-650

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE, NORTHERN DIVISION

JAMES A. CHANDLER and wife, IVA I. CHANDLER and HATTIE SUE KENNEDY,

Plaintiffs,

v. (FILED 6/22/84)

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER d/b/a GETTELFINGER FARMS, and CHARLES RITTER,

Defendants.

and

FRANCES LOLA WOMACK and HATTIE SUE KENNEDY,

Plaintiffs,

v.

DORIS Y. GETTELFINGER and DONALD J. GETTELFINGER d/b/a GETTELFINGER FARMS, and CHARLES RITTER,

Defendants.

ORDER

For the reasons stated in an oral opinion rendered from the bench on June 22, 1984, it is hereby ORDERED that defendants' motion for judgment notwithstanding the verdict of the jury or alternatively for a new trial or remittitur be DENIED.

It is further ORDERED that the parties' joint motions for an order allowing them to exceed the page limits for their post-trial briefs be GRANTED.

It is further ORDERED that defendants' motions for a stay pending resolution of the aforementioned motions be DENIED as MOOT.

ENTER:

[Signed: Robert P. Murrian)

Robert P. Murrian
UNITED STATES MAGISTRATE

(2)

Supreme Court, U.S.
FILED
JUL 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1849

In The

Supreme Court of the United States

October Term, 1986

Frances Lola Womack, Individually, and as Surviving Spouse of William Sydney Womack, Deceased,

and

James A. Chandler and wife, Iva I. Chandler,

Petitioners,

v.

Donald J. Gettelfinger & wife, Doris Y. Gettelfinger, d/b/a Gettelfinger Farms

and

Charles S. Ritter,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Tennessee diversity highway accident case: Whether there was any substantial and material evidence of gross negligence presented at trial such that it was appropriate to submit the question of punitive damages to the jury.

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OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit was correctly cited in the Petition as being reported at 808 F.2d 446; however, two pages of the opinion were omitted in the Petitioners' "Appendix A" (pages 12 & 13). Consequently, the entire Opinion is included in this Brief in Opposition as "Appendix A".

STATEMENT OF THE CASE

The following addition to the statement of facts given in the Opinion below and by the Petitioners is submitted:

The Petitioner Mr. Chandler and the decedent, Mr. Womack, were iron workers working in Oak Ridge, Tennessee, and they customarily rode to work with another iron worker in his automobile. On the morning of the accident, the Petitioner Mr. Chandler woke up and heard a report on the radio that there was a driver's alert due to foggy weather. For that reason he left home early. He met the others and they started for work. The fog was equivalent to the heaviest the driver had ever driven in and it got foggier as they approached the scene of the accident, which is a half mile from the Clinch River. It was completely dark. The driver of the car did not feel that it was safe to drive that morning, but since they all had to go to work, they drove anyway. Appendix, Court of Appeals, at 279, 280, 295, 303, 306, 308, 316. [References to "Appendix, Court of Appeals" are to the Joint Appendix filed below.]

The Respondent Charles Ritter, after spending the night in his cab, awoke the morning of the accident and conducted a safety check of his lights, tires, brakes, etc., noting that the fuel in his diesel reefer unit was low—an eighth of a tank. A cardinal rule among truckers is that a diesel must not run out of fuel. That is a significant problem because when a diesel runs out of fuel, it may take four to six hours or longer and the services of a diesel mechanic to restart it. By that time, the load may have spoiled. Mr. Ritter decided that his course of action would be to obtain fuel and head for his destination. Appendix, Court of Appeals, at 158-162, 191, 225, 227, 410.

Among truckers, whether to operate a truck in fog or other bad weather is left up to the driver, and generally, they will drive if other traffic is moving. Other traffic was moving that morning and Mr. Ritter pulled onto the interstate looking for fuel. Appendix, Court of Appeals, at 162, 179, 192-193, 248, 414.

Just before the accident, as Mr. Ritter was pulling onto the highway making a right turn, he noticed a ditch on his right at the edge of the driveway. The ditch was 31-32 inches deep. He was concerned that his rear wheels not get in the ditch, because with a heavily loaded trailer the whole rig might have turned over, or the load might have shifted causing the front of the trailer to go down against the drive wheels. The rig would then be stuck in that position, blocking the road until a wrecker arrived. Appendix, Court of Appeals, at 169-170, 245-247, 432-433, 462-463, 484. The rear wheels on Mr. Ritter's trailer were some 40 feet behind the tractor. In making the turn called for in this situation, truckers have to swing out and make

a much wider turn, preferably keeping the rear wheels in view through their rearview mirrors. The safe practice is to keep the rear wheels out of the ditch and this is so even if the trucker must swing out to the other side of the road. Appendix, Court of Appeals, at 245, 247-248.

Swinging out as Mr. Ritter did is how you "would have to make the turn" according to one of two truckers testifying for the Petitioners and was "proper driving", although he felt it could be done with only a two foot encroachment on the other lane. In his driving experience there had been times when he, too, had to block highways in pulling out of a lot to keep his rear wheels from dropping into a ditch. Appendix, Court of Appeals, at 234, 244, 273-274. The other trucker who testified for the Petitioners re-enacted the turn, but in broad daylight and with an empty truck. His rear wheels went into the ditch the first time. Since his truck was not loaded there were no serious consequences. When he tried again, his rear wheels were right at the edge of the ditch and he blocked about half of the other lane. Appendix, Court of Appeals, at 399-400, 425.

On September 28, 1983, about two weeks before the accident, the Respondent Ritter and one Larry Goode had filled out employment applications at Gettelfinger Farms. Mr. Goode was an experienced, qualified truck driver, driving since 1971. Mr. Ritter, 33 years old, had worked in service stations for 15 years or so, and Mr. Goode had taught him to drive a tractor trailer and was trying to help him get started. Mr. Ritter had ridden with Mr. Goode for three to five years, sometimes driving for him, for instance, while Mr. Goode was sleeping. Appendix,

Court of Appeals, at 66, 74, 82, 144-147, 154-155, 198-200, 204, 223, 474.

Federal regulations require that before putting a driver on the road, an employer must either give a driver a specified road test or receive a certificate that he had passed such a road test and is qualified. Mr. Ritter held such a certificate which had been given to him and signed by Mr. Goode. The certificate certified that Mr. Ritter was regularly driving a vehicle and was fully qualified under the regulations. Mr. Ritter presented this certificate to Gettelfinger Farms before he was hired. Appendix, Court of Appeals, at 57, 204-206, 238-239, 468, 472-474, 478, 520-521.

———o———

SUMMARY OF REASONS FOR DENYING THE WRIT

Although the Petitioners couch their argument in terms of the *Erie* doctrine and the 7th Amendment, the issue they argue is whether the evidence warranted submitting the case to the jury on the issue of punitive damages. They raise various side issues, such as whether the diversity court should apply the Federal or the Tennessee standard for reviewing a motion for directed verdict or a judgment N.O.V., whether the Court of Appeals used an erroneous standard of review, and whether the Court of Appeals was familiar with the Tennessee definition of punitive damages. However, through all the side issues they are complaining of only one thing: the Court of Appeals reversed the Trial Court's rulings on the Respondent's motions for directed verdict and judgment N.O.V. on punitive damages.

The Court below painstakingly reviewed the evidence (eight days of trial, Appendix of more than 800 pages), and determined that the particular facts and circumstances of this case did not rise to the level of gross negligence under Tennessee law. Accordingly, the Court below held that the Trial Court had been in error in allowing the punitive damages question to go to the jury. The Petitioners ask this court to second guess the Court of Appeals on that ruling. Such an endeavor would require this court to follow the path of the Court of Appeals in reviewing the evidence and would be of no possible benefit to anyone other than the parties. All are familiar with the Seventh Amendment and its requirement that a jury decision is to be upheld if it is supported by material evidence. Another statement by this court to that effect would be of no use in developing the law.

———o———

REASONS FOR DENYING THE WRIT

I.

No Substantial Erie Question is Presented Since There is No Practical Difference in the Federal and Tennessee Standards For Reviewing Motions For Directed Verdict and Judgment N.O.V.

The Petitioners argue, based on the *Erie* doctrine and the case of *Toth v. Yoder Co.*, 749 F.2d 1190 (6th Cir. 1984), that the Federal Courts sitting in diversity cases should apply the state standard for determining whether

motions for directed verdict or judgment N.O.V. should have been granted. They argue that the Court of Appeals for the Sixth Circuit applied the Federal standard and that such application constitutes error. Although the Respondents have no preference as to whether the Federal or State standard is used, we note that the question may be subject to debate. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-650, 97 S.Ct. 835, 836-837, 51 L.Ed.2d 112, 114 (1977); *Gold v. National Savings Bank of the City of Albany*, 641 F.2d 430, 434 n.3 (6th Cir. 1981).

A. No practical difference in the standards.

These standards have been stated in many cases and on many occasions. We do not set out the citations below as being the only acceptable language but merely as fair representative specimens. The Court should:

Federal	*Tennessee*
view the evidence in the light most favorable to Mrs. Gillham, who secured the jury verdict, & a judgment N.O.V. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence. *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975).	take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence. *Holmes v. Wilson*, 551 S.W.2d 682, 685 (Tenn. 1977).

B. Not outcome determinative.

If there is any difference in the standards as listed, it is so minute as to be of no practical significance. Under either standard, the question is whether there was any substantial and material evidence to support the point in question. Obviously, the result in the case at bar would be the same regardless of which standard was used.

II.

No Substantial Seventh Amendment Question is Presented, Since the Question is Merely Whether, on the Unique Facts of this Case, the Petitioners Have Made Out a Jury Question on a Particular Issue.

The Petitioners claim that they presented evidence of gross negligence such that the case was properly submitted to the jury on the issue of punitive damages. The Court of Appeals disagreed, finding that they did not present such proof. Consequently, the Petitioners claim that their Seventh Amendment right to a trial by jury has been violated. The remarks of Justice Frankfurter in the case of *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 455-456, 3 L.Ed.2d 935, 947, 79 S.Ct. 921, 932 (1959), although made some years ago and in dissent, seem very pertinent on the question raised by the Petitioners:

> *If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict.* Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this court that the Constitution has been violated. This verbal smokescreen cannot ob-

scure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence. (Emphasis added).

A. Additional ruling on this point would add nothing to American jurisprudence.

The applicable rule of law is long and well settled. We quote one of the many statements of the rule from the case of *Mortensen v. United States,* 332 U.S. 369, 374, 645 S.Ct. 1037, 1040, 88 L.Ed. 1331, 1335 (1944), which states that the question is: "[W]hether there was *any competent and substantial evidence* fairly tending to support the verdict." (Emphasis added). The focal point of judicial review is "the *reasonableness* of the particular inference or conclusion drawn by the jury." *Sentilles v. Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 110, 80 S.Ct. 173, 4 L.Ed.2d 142, 145 (1959). (Emphasis added).

The rule is familiar. The only question the Petitioners raise is whether the Court of Appeals properly applied the rule. On occasion in the past, this court has taken up such questions, particularly in the FELA and Jones Act cases cited in the Petitioners' brief, but the prevailing view and the better practice is that certiorari is improvidently granted when the only question is the propriety of submitting certain questions to the jury. *Houston Oil Co. v. Goodrich,* 245 U.S. 440, 441, 38 S.Ct. 140, 141, 62 L.Ed. 385 (1918).

B. The Court of Appeals did not create a "new standard" with which to review the motions for directed verdict and judgment N.O.V. in this case.

The Petitioners complain that the Court of Appeals "established a new Federal standard" for reviewing mo-

tions for directed verdict and judgment N.O.V. The new standard, says the Petitioners, requires Federal judges to reweigh evidence, assess the credibility of witnesses, and utilize a preponderance of the evidence test in deciding these motions. We aren't certain where the Petitioners got the idea that the Court of Appeals used those methods because the only place their "buzzwords" are found is in their petition. The concepts the Petitioners refer to certainly are not found in the opinion of the Court of Appeals. There is no indication that the Court of Appeals did any of the things that the Petitioners complain of. The bulwark of the Petitioners' argument seems to be the statement of the Court of Appeals that the case was a "close one", referring to the propriety of allowing punitive damages under the facts presented. Only the Petitioners can tell us how they concluded from that statement that the Court of Appeals applied a preponderance of the evidence test. Accepting the Petitioners' argument would mean that every case in which the Court of Appeals indicated that their decision was any more than a rubber stamp matter would be subject to reversal on Seventh Amendment grounds.

In point of fact, there is every indication that the Court of Appeals applied the customary "any substantial and material evidence" test, and gave the Petitioners the benefit of all favorable inferences. In the opinion, the court is careful to point out evidence "from which the jury could reasonably have inferred" various matters, such as that Mr. Ritter's four-way flashers were not on and that Mr. Ritter had not passed certain tests. Appendix A, this brief, at 6 & 18.

C. Accepting this case would require the Supreme Court to review the facts and pass on the sufficiency of the evidence.

It should go without saying that any time an appellate court reviews the action of a court below on motions for directed verdict or judgment N.O.V. it will be called upon to carefully review all of the facts of the case. The Court's position on this function is indicated by Justice Holmes in *United States v. Johnston,* 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed. 925, 926 (1925): "We do not grant a certiorari to review evidence and discuss specific facts."

Further, as Justice Frankfurter pointed out in *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 461-462, 79 S.Ct. 921, 935, 3 L.Ed.2d 935, 950 (1959):

> It is the *staple business of courts of appeal to examine records* for the sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice. Such disregard of sound judicial administration is emphasized by the fact that the judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury. (Emphasis added).

D. Based on the facts presented, the Court of Appeals was correct in its judgment in reversing the Trial Court's actions on the motions for directed verdict and judgment N.O.V.

The Petitioners claim to have presented evidence of gross negligence by the Respondents. In doing so, they

have placed a premium on their own characterizations at the expense of reviewing the actual undisputed facts. For example they make charges relating to Mr. Ritter's "intentionally blocking a two-lane highway" and Gettelfinger Farms "intentionally violat[ing] Federal standards". Although all of the factual issues were briefed to the Court of Appeals, we will only touch on a few of the more important points here. The Trial Court gave a very good summary of the case in regard to Mr. Ritter's negligence in operating the tractor trailer:

> . . . in undertaking to pull out onto the highway in the fog, risking injury to himself and damage to the truck, Mr. Ritter evidently expected to make a safe turn. His negligence was not so gross or wanton as to evince conscious indifference to the consequences of his action. On the facts of this case, we do not believe the Tennessee Supreme Court would sustain an award of punitive damages against Mr. Ritter. Appendix A, this brief, at 17.

The Petitioners, with their argument that Mr. Ritter "intentionally blocked" the highway seem to imply that Mr. Ritter's ultimate objective was the blocking of the highway to the detriment of other drivers. Actually, Mr. Ritter's "intention to block the road" was merely his agreement on cross-examination that when he pulled out, he knew the road would be blocked. Appendix, Court of Appeals, at 119-120.

The better statement would be that Mr. Ritter was "intentionally turning around" and that an unfortunate side effect of his turning around was the blocking of the highway. In that connection we point to the testimony of one of the Petitioners' own expert witnesses, as set out

in the supplemental facts of this brief, that swinging out as Mr. Ritter did is how you "would have to make the turn" and was "proper driving", although he felt it could be done with only a two foot encroachment. Of particular interest is the re-enactment of the turn by the Petitioners' other expert trucker. He made the same turn in broad daylight with an empty truck and his rear wheels went into the ditch on his first try. Since his truck was not loaded there were no serious consequences. When he tried again, he was able to avoid the ditch but he blocked about half of the other lane. It is interesting to speculate how he might have fared with a fully loaded truck in pitch darkness and fog.

Turning now to the negligent entrustment cause of action, the Petitioners charge that Gettelfinger Farms "intentionally violated" Federal standards on the hiring, training and testing of drivers. However, the facts they list do not support their charges. Let us review the facts they list (from pp. 4-5 of the Petition):

1. "Hired only by a secretary." Mr. Ritter filled out an employment application and was called by a secretary and advised to return for work. Appendix A, this brief, at 9.

2. "Had never driven a truck alone." It is true that Mr. Ritter had never operated a tractor trailer on his own before. However, he had driven with Mr. Goode for an extended period of time and even "ran together" with Mr. Goode for an extended period after beginning to work for Gettelfinger Farms. As the Trial Court pointed out, he drove several thousand miles for Gettelfinger Farms

without incident before the accident. Appendix A, this brief, at 8, 9 and 18.

3. "Failed the only driver's test he had ever attempted at another company." Mr. Ritter did fail a test at another company. As is pointed in the Court of Appeals opinion, Mr. Ritter testified that he failed because he made a mistake in shifting gears and the person who administered the test could not remember the reason for his failure. However, the person giving the test did testify that finding a truck driver had not passed a road test at another truck line would not be a factor in the decision to hire him. Appendix, Court of Appeals, at 445-446, 452, 413.

4. He was "not tested" at Gettelfinger Farms. Federal regulations require *either* a certain road test or a certificate that a prospective driver has already taken and passed the road test. 49 C.F.R. 391.11(10)(1983). It is not necessary to give a road test if the prospective driver has an appropriate certificate. Mr. Ritter's certificate stated that he was "regularly driving a vehicle" and was "fully qualified under Part 391, Federal Motor Carrier Safety Regulations". Further, according to the practice in the transportation industry, a driver may be hired on the basis of the certificate if the certifying driver is qualified. It is uncontroverted that Mr. Ritter presented a proper certificate to Gettelfinger Farms. The certificate was signed by Larry Goode, an experienced, qualified truck driver who had been driving since 1971. Thus, according to the regulations and the practice in the trucking industry, it was appropriate for Gettelfinger Farms to hire Mr. Ritter without giving him a road test. Appendix, Court of

Appeals, at 57, 204-206, 238-239, 468, 472-474, 478, 520-521, Appendix A, this brief, at 18.

Federal regulations also call for a certain written test. Although the Court of Appeals noted that the jury "reasonably could have found" that Mr. Ritter did not pass the written test, the test is an "instructional tool only" and a person's qualifications to drive are not affected by his performance on the test. 49 C.F.R. 391.35(6) (1983); Appendix A, this brief, at 18.

5. "The only person familiar with the driver's qualifications stated he was incompetent." In the first place, the witness to whom the Petitioners refer (Larry Goode), did not really testify that Mr. Ritter was "incompetent". The Court will recall that Larry Goode is the driver who taught Mr. Ritter to drive, who slept while Mr. Ritter was driving, and who issued the certification card to Mr. Ritter. Mr. Goode's actual testimony is as follows:

> (examination by Petitioners' counsel)
>
> Q. Mr. Goode, having seen and observed Mr. Ritter, in your judgment, is he a competent, safe driver?
>
> A. Well, if I had it to do over with, I wouldn't sign the card for him.
>
> Q. Would you please answer my question?
>
> A. I don't feel that he is qualified.
>
> Appendix, Court of Appeals, at 261-262.

At any rate, whether we say "not qualified" or "incompetent" Mr. Goode's testimony is not evidence of a violation of any Federal safety standards. To the contrary, the testimony points up the fact that Mr. Ritter did

have the certificate required by Federal safety standards. After the fact, Mr. Goode says he wished he hadn't given Mr. Ritter the certificate, but he admits that he issued the certificate and that he did not tell Gettelfinger Farms at any time before the accident that he felt Mr. Ritter was not qualified.

It is thus seen that the Petitioners are unable to back up their characterization that Gettelfinger Farms "intentionally violated" Federal standards. To the contrary, the standards were followed and as the Trial Court pointed out, the evidence shows that Mr. Ritter "did, in fact, know how to drive". Accordingly, the court will realize that the learned Court of Appeals was eminently correct in reversing the award of punitive damages.

III.

The Petitioners Merely Question the Court of Appeals' Interpretation of State Law.

A. The review of state law questions is better left to the Courts of Appeal.

The Petitioners claim that the Court of Appeals misapplied the Tennessee standard for punitive damages. The Court of Appeals, say the Petitioners, "has seen fit to apply his own standard for punitive damages awards rather than the state law standard" (in using the word "his", the Petitioners are referring to the learned judge who authored the opinion). In making this argument the Petitioners suggest that this Court review Tennessee law and determine if it was properly followed. Similar petitions for certiorari have been filed many times before. The Court's general feeling on these types of petitions

is stated in *Huddleston v. Dwyer,* 322 U.S. 232, 237, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246, 1249 (1944):

> Ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate Federal appellate courts.

As Justice Frankfurter stated in his dissent in *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 458, 79 S.Ct. 921, 933, 3 L.Ed.2d 935, 948 (1959):

> To bring a case here when there is no 'special and important' reason for doing so, when there is no reason other than the interest of a particular litigant, especially when the decision turns solely on a view of conflicting evidence or the application of a particular local doctrine decided one way rather than another by a Court of Appeals better versed in the field of such local law than we can possibly be, works inroads on the time available for due study and reflection of those classes of cases for the adjudication of which this court exists.

In another instance, Justice Frankfurter, joined by Justice Harlan, again dissented from the Court's grant of certiorari. In *Gibson v. Phillips Petroleum Co.,* 352 U.S. 874, 77 S.Ct. 16, 1 L.Ed. 77 (1956), the Justices first noted that the case was an ordinary suit for damages for injuries claimed to have been caused by Defendant's fault and that "hundreds upon hundreds" of such suits are constantly brought in the state courts. Then noting that similar diversity suits were becoming an increasing burden upon the Federal courts, the Justices made this observation:

> This court cannot determine whether the Court of Appeals was right or wrong in its judgment without de-

> termining whether on this record the case should or should not have been left to the jury. That can only be decided on the basis of an investigation of Texas law. This court is not a court to determine the local law of the 48 states.

Instead of attempting to determine local law the Supreme Court, as is noted in *Bishop v. Wood*, 426 U.S. 341, 346, 48 L.Ed.2d 684, 690-691, 96 S.Ct. 2074, 2078 (1976), will accept a reasonable construction of state law by a United States Court of Appeals "even if an examination of the state-law issue without such guidance might have justified a different conclusion".

B. The opinion of the Court of Appeals does not conflict with Tennessee law since Tennessee law was correctly applied.

The Petitioners generally claim that the court below applied a standard for determining punitive damages which was somewhat stiffer than the Tennessee standard. Their complaint centers around the Court of Appeals' use of the term "*mens rea*" in its opinion. From the viewpoint of the Petitioners this term has an almost talismanic significance. Actually, the term "*means rea*" merely refers to the state of mind of a party at the time of a particular event, generally meaning "bad mind". As the Court will note from the Tennessee authorities, there is a state of mind requirement for awarding punitive damages in Tennessee, variously described as follows:

> Where the wrongdoer behaved so wantonly or grossly as to show a willingness to inflict the injury. *Earley v. Roadway Express*, 106 F.Supp. 958, 959 (E.D. Tenn. 1952).
>
> Where there is an entire want of care as to raise a presumption of conscious indifference to consequences.

Honaker v. Leonard, 325 F.Supp. 212 (E.D. Tenn. 1971).

Where there are circumstances of aggravation and usually there must be some 'wrong motive accompanying the wrongful act'. *Walgreen Co. v. Walton,* 64 S.W.2d 44, 52 (Tenn. App. 1933).

The 'turpitude of Defendant's conduct is considered, and there must be a 'wrong intent' on his part. *Stepp v. Black,* 14 Tenn.App. 153, 166 (1931).

The cases, all using somewhat different language, clearly evince the fact that the Tennessee courts require a finding of a particular wrongful state of mind before allowing punitive damages. The Court of Appeals properly characterizes that state of mind as "the kind of *mens rea* that makes it reasonable for the government not only to require payment of full compensation, but to exact retribution as well". Appendix A, this brief, at 12.

Incidentally, the case of *McParland v. Pruitt,* 284 S.W. 2d 299, 303 (Tenn. App. 1955), holds that an "inadvertent violation of a traffic regulation does not constitute gross and wanton negligence". In that regard we note that Mr. Ritter was charged with failure to yield the right of way and fined $10.00 instead of being charged with vehicular homicide. This fact is a good indication of Mr. Ritter's state of mind.

The Petitioners also misunderstand the Court of Appeals' citation to *Williams v. Union Carbide Corp.,* 790 F.2d 552 (6th Cir. 1986), a case arising in Arkansas. The Petitioners seem to suggest erroneously that the Court below went by the Arkansas standard for gross negligence. The Court of Appeals did not cite the case on that point. Actually, the case was cited only as authority for the prin-

ciple that the Federal courts in diversity must award punitive damages according to the state-created standards, rather than for the particulars of the Arkansas standard. Appendix A, this brief, at 12.

The Court of Appeals carefully reviewed the relevant Tennessee cases dealing with punitive damages, including cases dealing with tractor trailer rigs as well as other cases, and carefully compared the conduct of the Respondents in the case at bar to that of the defendants in the Tennessee cases. After doing so, the Court of Appeals indicated that:

> the conduct of the truck driver, Mr. Ritter, while it had tragic consequences, does not seem to bespeak the 'conscious indifference to consequences' manifested in the actions of the truck drivers in *Daniels* and *Garner*. [Two Tennessee cases where gross negligence was found.] Appendix A, this brief, at 14.

The court then indicated that Mr. Ritter's driving represented:

> poor judgment and lack of ordinary care, but that is not the stuff of which million dollar—plus punitive damages awards are made—at least not in Tennessee. Appendix A, this brief, at 14.

(The page of the Opinion below on which these passages appear was omitted from the copy of the Opinion included in the Petition for Writ of Certiorari. Consequently, we have included the entire Opinion of the Court below as Appendix A to this Brief).

The Court of Appeals' language just above may be contrasted with the claims of the Petitioners that the Court of Appeals has "mandated" that a defendant must

possess "intense culpability and bad motive" in order to justify an award of punitive damages in Tennessee. As can be seen, the standard applied by the Court of Appeals was the very standard the Petitioners called for in their Petition:

Petition for Writ of Certiorari	*Court of Appeals Opinion*
That is, in Tennessee, an award of punitive damages is proper, as an example, upon a finding of *mere conscious indifference to the consequences of one's actions.* (Emphasis added). Petition, at 28-29.	. . . in undertaking to pull out onto the highway in the fog, risking injury to himself and damage to the truck, Mr. Ritter evidently expected to make a safe turn. His negligence was not so gross or wanton as to evince *conscious indifference to the consequences of his action.* (Emphasis added). Appendix A, this brief, at 17.

By the same token, in regard to the negligent entrustment issues, the court indicated that the conduct of Gettelfinger Farms "does not bespeak the kind of wanton misconduct necessary to support a punitive damage award". Appendix A, this brief, at 18.

IV.

The Case Has No Significance Beyond the Immediate Facts and Parties.

This Court generally seems to extend certiorari jurisdiction only to adjudicating Constitutional issues, questions of national importance, settlement of conflict among the circuits, etc. As the Court has said, certiorari jurisdiction "is a jurisdiction to be exercised sparingly and

only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co.,* 240 U.S. 251, 257-258, 36 S.Ct. 269, 271, 60 L.Ed. 629, 633 (1913). None of these extraordinary matters seem to be present in the case at bar.

Thus, even if the case were wrongly decided below, in granting certiorari, this Court would be performing a mere error-correcting function that would be of no importance except to the litigants themselves. In such a case, the Court considers the granting of a writ to be inappropriate. *Rudolph v. United States,* 370 U.S. 269, 271, 82 S.Ct. 1277, 1278, 8 L.Ed.2d 484, 486 (1962).

—o—

CONCLUSION

For the reasons set out herein, the Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Nos. 84-5613, 84-5614, & 84-5651

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANCES LOLA WOMACK,
Plaintiff-Appellee (84-5613),

and

JAMES A. CHANDLER, et al.,
Plaintiffs-Appellees (84-5614),

v.

DONALD J. GETTELFINGER, et al.,
Defendants/Third-Party Plaintiffs-Appellants,

v.

RONALD D. KENNEDY, et al.,
Third-Party Defendants-Appellees (84-5651).

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed December 29, 1986

Before: JONES and NELSON, Circuit Judges; and PECK, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. At 6:30 in the morning of October 14, 1983, defendant Charles S. Ritter, a relatively inexperienced truck driver operating a trac-

tor-trailer owned by defendant Gettelfinger Farms, entered a two lane state highway from the driveway of a restaurant in rural Tennessee. The highway ran north-south, and Mr. Ritter approached it from the west side. Keeping the rear wheels of his trailer in sight in his rear view mirror, and taking care that they did not go into a ditch that was present at the side of the driveway, Mr. Ritter made a wide right turn, swinging onto the shoulder at the far side of the road. He intended to pull into the southbound lane at the completion of his turn.

Third-party defendant Ronald D. Kennedy, driving his automobile north on the highway, saw the headlights of the truck pointing toward him from the shoulder. It was still dark, and there was a very heavy fog. Confused by the position of the oncoming truck headlights, and failing to see the trailer angled across the road, Mr. Kennedy drove into the side of the trailer. One of his passengers, William Sidney Womack, was killed, and another passenger, plaintiff James A. Chandler, was injured.

Mr. and Mrs. Chandler and Mr. Womack's widow brought federal court diversity actions against Mr. Ritter and Gettelfinger Farms, seeking compensatory and punitive damages. The defendants filed third-party complaints against Mr. Kennedy and against Joe R. and Linda Woods, the operator and owner, respectively, of an automobile that hit the Kennedy car some minutes after the initial accident.

The two original actions were tried to a jury, and after defense motions for a directed verdict as to punitive damages had been denied, Mrs. Womack and Mr. and Mrs. Chandler recovered judgments against Mr. Ritter and Get-

telfinger Farms for compensatory damages totaling $610,-963.02 and punitive damages totaling $1,250,000. The magistrate before whom the case was tried then entered summary judgment against Gettelfinger Farms and the truck driver on their third-party claims for contribution or indemnity and for damage to the tractor-trailer. The magistrate held that these claims were barred by the jury's finding that the defendants had been guilty of conduct warranting the award of punitive damages. While the case was on appeal, Mr. and Mrs. Woods entered into a $2,500 settlement with Mrs. Womack and obtained a release of liability from her. On the strength of this release, the Woods have moved for dismissal of the appeal of the summary judgment as to them on mootness grounds, the third-party complaint in the Chandler case having been dismissed by agreement prior to trial.

The central issue presented on appeal is whether the magistrate erred in submitting the claim for punitive damages to the jury and in overruling a motion for judgment notwithstanding the verdict on the punitive damage issue. The question is a close one, but we have concluded that the Tennessee courts probably would not permit an award of punitive damages under the circumstances of this case. We shall therefore reverse both the judgment for the plaintiffs, insofar as it awards punitive damages, and the summary judgment for the third-party defendants.

I

The rig that Mr. Ritter was driving consisted of a 1979 Mack cab-over tractor, with manual transmission and five forward gears, and a refrigerated trailer 42 feet in length. Gettelfinger Farms, a trucking concern, turned the

rig over to Mr. Ritter on September 29, 1983, when he started work for Gettelfinger Farms as a probationary employee. Mr. Ritter had driven the tractor-trailer for several thousand miles by the time of his accident, picking up and discharging loads of perishable food products at various points in Mississippi, Texas, Michigan, Tennessee, Ohio and Kentucky.

On the evening before the accident Mr. Ritter was driving east on Interstate Route 40 in Tennessee, hauling a full load of food products that he was supposed to deliver in New Jersey the following afternoon. He testified that he pulled off the road at about 9 p.m., having encountered thick fog, and spent the night sleeping in his cab. As is customary, the diesel engine of his truck and the diesel-powered refrigerator unit on his trailer were left running. Mr. Ritter got up a few minutes before 6 a.m., made a safety check, and noted that the fuel gauge on the refrigeration unit's diesel fuel tank registered only one-eighth full. Although it was still foggy, Mr. Ritter resumed his journey, keeping an eye out for a place to refuel. Having noticed a billboard advertisement for a truck stop that he assumed would be at the next exit, as he testified, Mr. Ritter took that exit and drove north for a short distance on Tennessee State Route 95.

Seeing a lighted restaurant at the right hand side of the road, Mr. Ritter parked his truck on the shoulder of the road, still pointing north, and went into the restaurant to ask where he could buy fuel. He was told that he would have to turn around and go back in the direction from which he had come.

Mr. Ritter testified that he then went back to his truck, turned off his "four-way flashers" (both turn sig-

nals on the tractor and on the trailer), signaled for a left turn, and pulled onto the road. Because he was going very slowly, looking for a place to turn around, he testified that he put his flashers back on.

About two-tenths of a mile farther on Mr. Ritter saw another restaurant, this one on the left side of the road. The restaurant had a paved driveway and parking area. Mr. Ritter made a left turn into that driveway, looped around in the parking lot, and stopped his truck before reentering the highway. He testified that he looked both ways, saw nothing coming, and pulled out onto the road to begin his turn to the right. He was operating in low gear at half throttle.

Looking down to his right, Mr. Ritter saw a ditch at the side of the driveway. He wanted to make sure that his rear wheels did not slip into the ditch, which might have caused his loaded trailer to flip over on its side, so he made a wide turn, pulling onto the shoulder at the far side of the road. He kept the right rear wheels of his trailer in sight in his mirror, to make sure he was keeping the wheels away from the ditch. The fact that the tractor did not have power steering may have led him to make his turn even wider than it would have been otherwise.

As Mr. Ritter was maneuvering onto the road, Mr. Ronald Kennedy, an iron worker at a local construction project, was driving north in a Ford Escort automobile. Two fellow iron workers, Mr. Womack and Mr. Chandler, were passengers in the car; Mr. Chandler was in the front seat, and Mr. Womack was dozing in the back. Mr. Kennedy's car was equipped with halogen fog lights, and it was going about 35 miles an hour.

Rounding a slight curve to the south of the restaurant, Mr. Kennedy saw the headlights of the truck about 400 or 500 feet away. Surprised at the position of the headlights, Mr. Kennedy made a comment about them to Mr. Chandler. Mr. Chandler responded "It looks like he is on our side [of the road]" and then said "No, he is over to our right." Mr. Kennedy agreed, saying "Yeah, he is sitting on the shoulder of the road." Neither man saw the trailer angled across the road until it was too late to stop. Mr. Kennedy had taken his foot off the accelerator, slowing down to about 25 miles per hour, but did not see the trailer until he was past the headlights of the tractor. Mr. Kennedy swerved to the left just before the impact, but could not avoid hitting the trailer. The driver of the truck, Mr. Ritter, (concentrating, perhaps, on his rear wheels and the ditch) did not see the oncoming automobile in time to flash his lights, sound his horn, or otherwise signal Mr. Kennedy to stop. There was evidence from which the jury could reasonably have inferred that the truck's four-way flashers were not on. The truck was equipped with a reflectorized triangle, but Mr. Ritter had not set it out before starting his turn. There was testimony from a state official, Ronald Stanley, the triangle would have done no good in the fog. Flares would have been visible, but Gettelfinger Farms did not equip its trucks with flares and was not required to do so by government regulations.

Mr. Stanley, the state official, happened on the scene just after the accident. Driving south on State Route 95 at a speed of 30 to 40 miles per hour, and seeing the back of the trailer sitting on the road, Mr. Stanley eased his patrol car around it. (He had no trouble stopping in time.) When he saw there had been a collision, Mr. Stanley parked

on the shoulder of the southbound lane and turned on his flashing blue lights. Mr. Ritter, who had stopped his truck after the impact and jumped out of his cab, asked Mr. Stanley if he should move the truck out of the road. Mr. Stanley told him to do so. Mr. Ritter then backed up a foot or two, disengaging the trailer from the Kennedy car, and pulled the entire rig onto the shoulder of the northbound lane. He left his lights on, as Mr. Stanley told him to.

Some ten or fifteen minutes after the accident, Mr. Joe R. Woods, driving his car north on State Route 95 at around 30 or 35 miles per hour, saw the headlights of the truck on the shoulder to his right and the blue lights of the patrol car on the opposite shoulder. He did not see the Kennedy vehicle in the middle of the road until he had gone past the headlights of the truck. He slammed on his brakes when he saw the Kennedy car, but could not avoid hitting it. Mr. Womack was still in the car.

Mr. Ritter subsequently admitted that he had caused the accident because he had been blocking the road. Mr. Ritter said he "was going to jail," but in fact he was only fined $10 plus court costs for failure to yield the right-of-way.

An experienced truck driver who testified as an expert witness on behalf of the plaintiffs told the jury that although he did not believe Mr. Ritter should have been put in prison, it was very dangerous for him to have pulled out onto the far side of the road in the fog without using flares. There was some suggestion that it would have been possible to make the turn without going much over the center line, in which event flashing lights would have pro-

vided all the warning necessary, but the main thrust of the testimony was that Mr. Ritter ought to have remained in the restaurant parking lot until the fog had lifted.

Extensive evidence was also presented on Mr. Ritter's lack of experience as a truck driver and on the failure of Gettelfinger Farms to investigate his qualifications before hiring him. Mr. Ritter, a married man in his early thirties, had a 9th grade education and had spent fifteen years working in service stations and at odd jobs. He had a long-time friend named Larry Goode, a truck driver by trade, who had allowed Mr. Ritter to ride with him, off and on, for several years, and who had worked with Mr. Ritter to teach him to drive a truck. Federal regulations require that anyone in the cab of a truck "be certified and capable of driving," according to Mr. Goode's testimony, and in 1981 Mr. Goode had signed a certificate of qualification attesting to Mr. Ritter's ability to drive. Mr. Goode subsequently gave Mr. Ritter a second certificate, with an expiration date subsequent to the date of the accident. Mr. Goode let Mr. Ritter drive a total of between 700 and 1000 miles over a period of about three months prior to the accident in 1983. Mr. Goode sometimes slept while Mr. Ritter was driving. Both men had log books, and when Mr. Goode drove more than the legal limit, the excess time would apparently be logged to Mr. Ritter. Mr. Ritter would take over the driving when the men approached weigh stations where log books might be checked.

In 1982 Mr. Goode got Mr. Ritter a job spotting trailers at a General Electric facility, but other drivers had to help Mr. Ritter do the work and he was soon released from the job.

In August of 1983 Mr. Ritter applied for a job at Victory Freightways and was given a road test, which he failed. The person who administered the test could not remember the reason Mr. Ritter did not pass the test, but Mr. Ritter testified that it was because he missed a gear in shifting gears on a tractor that had a number of forward speeds.

Two months later both Mr. Goode and Mr. Ritter went to Gettelfinger Farms and filled out job applications. Mr. Gettelfinger testified that Mr. Goode told him Mr. Ritter, although short on experience, could safely handle a tractor-trailer, but Mr. Goode testified that no such conversation occurred, that he did not feel Mr. Ritter was qualified, and that he had lied when he certified Mr. Ritter as qualified. There is also a conflict in the evidence as to whether the men were given written open-book examinations before being hired.

Both men were called to work at the same time, and each man was given a truck to drive. No road tests were administered as far as they knew, but Mr. Gettelfinger testified that he followed Mr. Ritter in a pickup truck for 10 to 15 miles to check on Mr. Ritter's driving. Mr. Goode disputed this. It is clear, in any event, that Mr. Ritter drove the Gettelfinger truck for several thousand miles prior to the accident; that he and Mr. Goode "ran together" during the first week or ten days of their employment, staying no more than twenty miles apart from one another, and that Mr. Ritter had no mishap during that time. He did have a minor accident the day before the collision with which we are concerned here; it was occasioned, he testified, by someone cutting too sharply in front of him and then shopping at a red light.

Some weeks after the major accident Mr. Ritter had an accident in Texas. He told Gettelfinger and the state troopers that a deer had run in front of him, but Mr. Goode testified that Mr. Ritter said he had really fallen asleep at the wheel.

The punitive damage claims against Gettelfinger Farms were submitted to the jury under the theory of respondeat superior (as is permissible, under Tennessee law, where the agent's conduct would justify a punitive damage award against the agent) and under the theory that the accident had been caused by gross negligence in the entrustment of the truck to an incompetent driver. The jury's verdict was a general one, making it impossible to tell which theory (or theories) the jury accepted in assessing punitive damages against Gettelfinger Farms as well as against the truck driver.

II

Summarizing Tennessee case law going back to the last century, the Tennessee Supreme Court has said that punitive damages

> "are awarded in cases involving fraud, malice, gross negligence or oppression, *Knoxville Traction Co. v. Lane,* 103 Tenn. 376, 53 S.W. 557 (1899); or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligations, *Stepp v. Black,* 14 Tenn. App. 153 (1931); or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences. *Honaker v. Leonard,* 325 F.Supp. 212 (E.D. Tenn. 1971)." *Inland Container Corp. v. March,* 529 S.W.2d 43, 45 (Tenn. 1975).

It is only in cases involving this kind of egregious misconduct that punitive damages may be awarded. *Johnson v. Husky Industries, Inc.*, 536 F.2d 645, 650 (6th Cir. 1976); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1570 (6th Cir. 1985), *cert. denied* — U.S. —, 92 L.Ed. 2d 740 (1986). Intended to inflict punishment on the wrongdoer rather than to make the injured party whole (which is what compensatory damages are supposed to do, insofar as possible), punitive damages are based "upon the oppression of the party who does the injury." *Cathey*, 776 F.2d at 1570, citing *Lazenby v. Universal Underwriters Insurance Co.*, 214 Tenn. 639, 642, 383 S.W.2d 1, 4 (1964). Tennessee views punitive damages as "private fines," *Dykes v. Raymark Industries, Inc.*, 801 F.2d 810, 814 (6th Cir. 1986), citing *Huckeby v. Spangler*, 563 S.W.2d 555 (Tenn. 1978), and this quasi-criminal punishment is not to be imposed for mere negligence or want of care. To do so—particularly when the dollar amount of the "fine" is measured in the millions—could raise "important issues" under the United States Constitution. See *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. —, —, 89 L.Ed.2d 823, 837 (1986).

The standards for determining whether the wrongdoer's conduct is sufficiently oppressive to justify an award of punitive damages have been characterized as "confusing and devoid of any effective definition." Sales & Cole, "Punitive Damages: A Relic That Has Outlived Its Origins," 37 Vand.L.Rev. 1117, 1137 (1984). Unless the federal courts are prepared to hold punitive damages unconstitutional, however, or hold that they cannot be imposed without according the defendant some or all of the safeguards peculiar to criminal proceedings—neither of

which courses is urged on us here—federal courts must apply the state-created standards as best they can, limiting any recovery to compensatory damages where liability is based on garden-variety negligence (see, e.g., *Williams v. Union Carbide Corp.*, 790 F.2d 552 (6th Cir. 1986), applying Arkansas law), and permitting the jury to consider awarding both punitive and compensatory damages where the defendant's misconduct manifests the kind of *mens rea* that makes it reasonable for the government not only to require payment of full compensation, but to exact retribution as well.

The two Tennessee decisions that come closest to suggesting Mr. Ritter could properly be found guilty of gross negligence or reckless misconduct in the case at bar are *Inter-City Trucking Co. v. Daniels,* 181 Tenn. 126, 178 S.W.2d 756 (1944) and *Garner v. Maxwell,* 360 S.W.2d 64 (Tenn. Ct. App. 1961). Both cases involved trucks that were left parked on the highway at night, without adequate warning devices, while the drivers took their ease elsewhere. In each instance the truck driver was guilty of more than a momentary lapse of judgment, and in neither case did punitive damages, as such, play a significant role in the decision.

Daniels was a wrongful death case in which the decedent's widow recovered judgment, after a $2500 remittitur, for $6000. There was no award of punitive damages; only because of the defendant trucking company's attempt to rely on a contributory negligence defense did the question of "gross negligence" on the part of the truck driver arise. Under Tennessee law, contributory negligence on the part of the plaintiff's decedent would have meant that the widow and her three minor children could have re-

covered nothing—not even the modest compensatory damages awarded in the trial court—unless the truck driver (who, incidently, had no driver's license) could be said to have been guilty of gross negligence. Perhaps it is not too surprising that the Tennessee Supreme Court was able to discern gross negligence. In the first place, the truck driver had been guilty of negligence per se in failing to comply with a Tennessee statute requiring three lighted flares or pot torches to be placed around a vehicle parked on the highway at night. The truck driver did claim to have set out the required pot flares, but instead of standing by to keep them burning, he went into town to seek comfort and protection from the cold and remained away for at least an hour and a half. The flares (if they had been placed at all) went out, and the plaintiff's decedent was killed as a result. Likening the truck driver's attitude to that of a person who is guilty of criminal negligence, the court allowed the $6000 compensatory damage award to stand.

In *Garner v. Maxwell,* 360 S.W.2d 64, *supra,* a truck driver had left his disabled tractor-trailer outfit parked on the highway, at night, for about four hours. The truck driver had turned off the lights of the truck to save the battery and had gone home to bed, leaving the rig unattended and without the statutorily required three flares or three reflectors. The truck driver made no effort to employ a wrecker to get the tractor-trailer off the highway. A member of the Tennessee Highway Patrol ran his automobile into the tractor-trailer at about 12:30 a.m. A jury returned a verdict awarding the patrolman $21,000 for compensatory damages and $400 for punitive damages. The Tennessee Supreme Court affirmed a judgment en-

tered on this verdict, expressing the view that the truck driver had been guilty of such gross negligence as to deprive him and his partners of the right to rely on the defense of contributory negligence. The court was not impressed by the defendants' contention that the facts did not justify a charge on the subject of gross negligence, but could not decide that issue on appeal, under Tennessee procedure, because the question had not been presented in the defendants' motion for new trial.

In the case at bar, as was not true in *Daniels* and *Garner,* the jury's award of substantial compensatory damages will be allowed to stand whether or not the defendants are deemed to have been guilty of gross negligence. And passing, for the moment, the negligence of the employer, Gettelfinger Farms, we may say that the conduct of the truck driver, Mr. Ritter, while it had tragic consequences, does not seem to bespeak the "conscious indifference to consequences" manifested in the actions of the truck drivers in *Daniels* and *Garner.* Unlike the truck drivers in those cases, Mr. Ritter did not turn off the lights of his truck and did not abandon his truck on the highway to seek personal comfort indoors. What he did, essentially, was pull his truck slowly onto a rural highway where, despite the fog, his lights could unquestionably be seen by the drivers of other vehicles from far enough away for them to stop without running into him. Mr. Ritter's failure to realize that other drivers might be confused by the position of his headlights doubtless represented poor judgment and lack of ordinary care, but that is not the stuff of which million-dollar-plus punitive damages awards are made—at least not in Tennessee.

A good example of the kind of reckless misconduct that can justify substantial punitive damages under Tennessee law may be found in *Sakamoto v. N.A.B. Trucking Co., Inc.*, 717 F.2d 1000 (6th Cir. 1983), a diversity wrongful death action where this court affirmed an award of punitive damages against a truck driver and his employer on account of an accident that occurred on Interstate Highway 75. The truck driver, an habitual user of amphetamines, had been without sleep for more than 40 hours. A new tractor had been brought to him following a breakdown, and after hitching up his trailer he decided to have breakfast at a restaurant located behind him on the interstate highway. Instead of going on to the next exit, the truck driver attempted to turn his rig around on the interstate itself, with a view to driving back the wrong way to an interchange he had passed before his breakdown. The tractor-trailer got stuck midway through the turn, and shortly thereafter the plaintiff's decedent slammed into it. Citing *Richardson v. Gibalski*, 625 S.W.2d 715 (Tenn. Ct. App. 1979), for the proposition that under Tennessee law "it takes something far greater than lack of ordinary care to sustain an award for punitive damages," this court concluded that there was sufficient evidence of gross negligence to justify submission of the punitive damages issue to the jury.

We think that the degree of Mr. Ritter's negligence is more like that of the defendant in *Southeastern Aviation, Inc. v. Hurd*, 209 Tenn. 639, 355 S.W.2d 436 (1962), a wrongful death action arising from an airplane crash. The pilot of a DC-3 on a scheduled flight from Memphis to Nashville noticed that the Automatic Direction Finder with which the plane was equipped was malfunctioning. The

ADF (a radio compass) enables a pilot to make an approach and landing when weather conditions prevent visual contact with the ground. When the pilot landed the plane at the Nashville Airport, he alerted the successor pilot who was to fly the plane on to the Tri-City Airport that the ADF was malfunctioning. The second pilot elected to try to reach his ultimate destination notwithstanding this fact, and notwithstanding that the plane had only one ADF and not two, as most up-to-date aircraft did. As the plane approached the Tri-City Airport, visual contact with the ground was impossible due to clouds, light snow, and fog—conditions not unsual for that time of year. When the pilot attempted to make his approach, he radioed to the tower operator that he was "having trouble" with the ADF and that he "didn't pick up the outer marker," a ground radio facility which would indicate his location. The plane then flew approximately 20 miles beyond the airport and crashed into the side of Holston Mountain, killing the plaintiff's decedent.

The Tennessee Supreme Court held there was sufficient evidence to support the jury's verdict that the defendant airline was "guilty of negligence in respect of the condition of its plane and the manner of its operation," *id.* at 662, 355 S.W.2d at 446, but also held that there was "no evidence that [the defendant] was guilty of such gross and wanton negligence as to justify any award for punitive damages." *Id.* at 664, 355 S.W.2d at 446-47. In setting aside an award of punitive damages in the relatively modest amount of $5,000, the court said that

> "While petitioner's (defendant's) pilot and First Officer were negligent in undertaking to fly a plane not airworthy, and in their manner of operation of the

> plane, there is nothing to show such gross and wanton negligence on their part as to evince conscious indifference to consequences. It must be remembered that their own lives were at stake, and they evidently expected to make a safe landing."

Id. at 665, 355 S.W.2d at 447.

So it was in the present case; in undertaking to pull out onto the highway in the fog, risking injury to himself and damage to the truck, Mr. Ritter evidently expected to make a safe turn. His negligence was not so gross or wanton as to evince conscious indifference to the consequences of his action. On the facts of this case, we do not believe the Tennessee Supreme Court would sustain an award of punitive damages against Mr. Ritter.

III

Insofar as the award of punitive damages against Gettelfinger Farms is concerned, our conclusion that Mr. Ritter was not guilty of gross or wanton negligence means that his employer cannot be held liable for punitive damages on a respondeat superior theory. Conceptually, however, gross negligence in the entrustment of the tractor-trailer to a known incompetent could justify an award of punitive damages even without gross negligence on the part of the driver himself. See Tenn. Code Ann. § 20-9-502 (1980); *Tracy v. Finn Equipment Co.*, 290 F.2d 498 (6th Cir.), *cert. denied*, 368 U.S. 826 (1961). On the record of this case, we do not believe that the negligence of Gettelfinger Farms in entrusting its truck to Mr. Ritter can support an award of punitive damages.

Evidence presented at trial indicated that Mr. Ritter was not properly certified to drive the truck. The jury

reasonably could have found that Mr. Ritter did not pass either the required road test or a written test prior to his employment by the Gettelfingers. Mr. Ritter did, however, present a competency certificate signed by Mr. Goode, an experienced driver, and the fact that Mr. Ritter drove the Gettelfinger truck for several thousand miles without significant incident shows that Mr. Ritter did, in fact, know how to drive. The accident in this case did not result from inability to shift gears or maneuver the truck; it resulted from a lapse of judgment that no pre-employment test would have been likely to predict. Negligent though Gettelfinger Farms may have been in hiring Mr. Ritter, the entrustment of a $200,000 tractor-trailer to an apparently responsible driver does not bespeak the kind of wanton misconduct necessary to support a punitive damage award.

IV

Rejecting two subsidiary claims advanced by the defendants, we do not find the compensatory damage awards excessive, nor do we believe that the district court abused its discretion in failing to grant the defendants a continuance. We shall therefore affirm the judgment of the district court insofar as it awards compensatory damages against Mr. Ritter and Gettelfinger Farms.

V

The magistrate granted the third-party defendants' motions for summary judgment in the third-party action against Mr. Kennedy and Mr. and Mrs. Woods because, under Tennessee law, "[t]here is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death." Tenn. Code

Ann. § 29-11-102(c) (1980). Equating gross negligence with intentional infliction of injury or death, the magistrate held that this statutory provision precludes grossly negligent tortfeasors from obtaining contribution or indemnity. We need not address that issue, having determined that as a matter of law the third-party plaintiffs were not guilty of gross negligence. Simple negligence does not bar contribution or indemnity among joint tortfeasors.

As the magistrate has held, the third-party plaintiffs may not recover for damage to the truck. Although it is unclear whether federal or state collateral estoppel rules should be applied in determining the preclusive effect, in the third-party action, of the negligence finding in the trial of the wrongful death and personal injury actions, Tennessee and federal law would dictate the same result here. In cases governed by federal law, collateral estoppel may clearly be invoked in situations such as that presented here. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971). Although the Tennessee Supreme Court has not precisely so ruled, it has indicated in dicta that it would follow the rationale of the Supreme Court (and the courts of other states) in holding that collateral estoppel may be used defensively by one who was not a party to the prior suit. See *Cotton v. Underwood,* 223 Tenn. 122, 131-32, 442 S.W.2d 632, 637 (1969); see also *Fourakre v. Perry,* 667 S.W.2d 483 (Tenn. App. 1983). Whether federal law or Tennessee law is applied, therefore, the third-party plaintiffs in this case are collaterally estopped from relitigating the issue of their own negligence. "Under Tennessee law contributory negligence is ordinarily a complete bar to a plaintiff's recovery." *McElroy v. Boise Cascade Corp.,* 632 S.W.2d 127, 136 (Tenn. App.

1982). Therefore, because the accident was found to have been caused by the third-party plaintiffs' negligence, Gettelfinger Farms is precluded from recovering from Mr. Kennedy for damage to its tractor-trailer.

VI

Finally, Mr. and Mrs. Woods have moved to dismiss the appeal as to them on the basis of their settlement agreement with Mrs. Womack. Tennessee Code Annotated § 29-11-105 (1980) provides,

> "(a) When a release or covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor."

In order for the Woods to be protected, under this statute, against a claim for contribution, the release must have been "given in good faith." The third-party plaintiffs contend that the release in this case was not given in good faith. As evidence of that fact, they point out that although Mrs. Womack was awarded $175,963.02 in compensatory damages and $500,000 in punitive damages, the settlement with the Woods was in the amount of only $2,500. More-

over, that settlement was entered into after entry of judgment, when the damage amounts were already determined.

Whether a release was given in good faith is a question of fact to be determined first by the trier of fact. *Florow v. Louisville & Nashville Railroad Co.*, 502 F.Supp. 1 (M.D. Tenn. 1979). The magistrate will have an opportunity to consider this question on remand.

Because Tenn. Code Ann. § 29-11-105 does not govern indemnity, we must look elsewhere to determine whether the third-party plaintiffs may still assert a cause of action against the Woods for indemnity. In *Southern Railway Co. v. Foote Mineral Co.*, 384 F.2d 224, 226-27 (6th Cir. 1967), this court approved the following jury instruction:

> "Under the Tennessee law a person who is held liable for negligence to one party may be indemnified or may recover indemnity in the amount of his liability from a third-party, if he establishes that the third-party is also guilty of negligence proximately causing or contributing to the cause of the accident, and that the negligence of the third-party was active negligence while his own negligence was only passive."

The instruction went on to explain that if one joint tortfeasor was guilty of active negligence, he could not recover indemnity from the other tortfeasor. *Id.* at 226. If both were guilty of active negligence, however, one could recover *contribution* from the other. *Id.* at 226-27. (Contribution is not available, as noted above, where there has been a good faith release.)

Because the magistrate granted summary judgment in favor of the Woods on the basis that one found guilty of gross negligence is not entitled to indemnity or contribution, and thus did not consider the active/passive negli-

gence issue, that issue, too, should be addressed by the magistrate on remand.

We AFFIRM the award of compensatory damages, REVERSE the award of punitive damages, and REMAND the third-party action for further proceedings in accordance with this opinion.

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1849

In The
SUPREME COURT of the UNITED STATES

October Term, 1986

Frances Lola Womack, Individually, and as Surviving Spouse of William Sydney Womack, Deceased,

and

James A. Chandler and wife, Iva I. Chandler,

Petitioners,

v.

Donald J. Gettelfinger & wife, Doris Y. Gettelfinger, d/b/a Gettelfinger Farms

and

Charles S. Ritter,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

THE INTERMEDIATE APPELLATE COURT USED A STANDARD IN REVIEWING THE PROPRIETY OF A MOTION FOR A DIRECTED VERDICT WHEREBY THE EVIDENCE WAS WEIGHED BY THE APPELLATE PANEL AND NO INFERENCES WERE GIVEN THE NON-MOVING PARTY

When the Petition for Certiorari was filed herein, it was not appreciated that Respondents would take the position that the required Tennessee standard when considering a motion for directed verdict was utilized by the Appellate Panel below. A reading of the Opinion of the Sixth Circuit Panel shows clearly the required standard of viewing the evidences in a light most favorable to the non-moving party was obviously not utilized. Examples:

1. The Appellate Panel concludes, using its standard of review, the driver merely sustained a "lapse of judgment".

Actually, the driver himself testified:

a. That he had stopped driving earlier because the fog was so heavy he could not see and he knew that it was dangerous to continue. *(App. 181, 182, 157).

b. That when he started driving again just before daylight the fog was just as heavy. (App. 182).

c. That he knew it would be dangerous to be driving the truck in that kind of fog. (App. 181, 182).

d. That when he got off onto the two-lane highway, he realized that in the fog that he might have trouble maneuvering on the two-lane road. (App. 117).

e. That although knowing that it was dangerous and that he would have difficulty maneuvering, he did not wait until daylight because he was in a hurry to get to Somerset, New Jersey by 2:30 p.m. (App. 100, 191-192, 237). His boss admitted that it was "ridiculously" impossible to drive from Knoxville, Tennessee to Somerset, New Jersey in that time period. (App. 465).

f. He admitted that he intended, when he pulled into The Fishing Pole, to block both lanes of the highway. (App. 119).

* Cites herein to "App." are to Appendix filed with Court of Appeals.

g. That he intended to drive his tractor all the way across to the far shoulder. (App. 119-120, 264-265).

h. That he knew and intended this maneuver to take several minutes and that he would be blocking the road for 4-5 minutes. (App. 265-266).

i. He knew that oncoming traffic would be unable to see the trailer across the highway. (App. 117-118).

j. That despite federal and state requirements, he admitted that he failed to use any warning devices. (App. 124).

k. He admitted that he knew that it might be hazardous to block the road in heavy fog with his trailer for 4-5 minutes. (App. 126).

l. He stated that he was looking in the direction the car was coming but, for some reason, didn't see the car until it was right on top of him. (App. 128-130).

2. The Appellate Panel found that the trucking company relied upon the truck driver's competency certificate signed by Larry Goode (Opinion, page 15). Actual fact shown: The company did not rely upon this certificate as it issued

its own certificate of road test on the very day the driver was hired (App. 78). Actually, Goode's certificate did not even conform to Federal regulations (App. 502). Further, the company had not road tested the driver. Defendant company's certificate was false. (App. 72, 201-202).

3. The Sixth Circuit panel concluded the driver was operating his vehicle in low gear at half throttle in the roadway as Plaintiffs approached (Opinion, page 4). Actual fact shown: The driver was jackknifed and stopped as the Plaintiffs approached (App. 287-288).

4. The Appellate Panel decided the driver was "perhaps" concentrating on his rear wheels and ditch and did not see the oncoming car (Opinion, page 5). Actual fact: The driver admitted he was looking

in the direction from which the Plaintiffs were coming but failed to see the vehicle for some unknown reason (App. 130).

5. The Appellate Panel concluded the driver was on this two-lane road looking for diesel fuel (Opinion, page 4). Actual fact shown: The driver was illegally dodging the weight scales on the interstate; had been in a vehicle for this purpose on this road previously and had been in a vehicle which turned around at the very location where this accident occurred. (App. 114, 216, 230-232, 263, 395, 170-171).

6. The Appellate Panel found the driver slept from nine o'clock p.m. to six o'clock a.m. the morning of the accident (Opinion, pages 3-4). Actual fact shown: The driver's logs had been

altered to reflect this required rest time (App. 214-216). The driver had only slept over the wheel for a couple of hours (App. 211). This is significant in light of the Defendant company's policy of dispatching drivers for jobs, knowing the driver would have to drive over the legal number of hours. (App. 210-211, 242). It was the usual practice of this driver to drive over the federal safety regulated times. (App. 243). This driver had another accident only weeks later from falling asleep at the wheel. (App. 208-209).

7. The Appellate Panel felt the driver must have been competent in that he had driven several miles without significant incident. (Opinion, page 15). Actual fact shown: Petitioners introduced proof this driver was not competent

(App. 185-187, 208-209, 212-213, 262, 402-405, 443-445). The driver had never been in a truck alone before. (App. 227). Further, the proof introduced on behalf of Petitioners was that a competent driver would not have maneuvered his vehicle so as to block the highway. (App. 402-404, 258-260).

8. Without considering most of the above evidence which was found so compelling by the trial judge, and/or after discarding same, the Court of Appeals concluded that the driver "...evidently expected to make a safe turn". (Opinion, page 17). Parenthetically, it should be noted that one would not be able to reach the Panel's conclusion "...evidently" without weighing the evidence and discarding proof in favor of the prevailing

party, and giving credibility to certain parts of the Defendant's testimony.

In any event, the presumption required the opposite conclusion, to-wit, the driver could not reasonably have expected to make a safe turn. The driver himself testified that he intended to drive the vehicle across to the far shoulder and knew he would be blocking both lanes of traffic in the fog and darkness. Importantly, he knew he would block the road for 4-5 minutes. He knew that oncoming traffic would be unable to see the trailer blocking the highway in view of the fog and dark. He knew that despite Federal and State requirements, he failed to use any warning devices. He admitted he knew it might be hazardous to block the road in heavy fog for 4-5 minutes. (App. 124, 126, 117-118,

265-266, 269, 119-120). Clearly if the proper standard had been utilized, and the evidence not weighed by the Appellate Panel, the opposite conclusion would have been "evident". The Defendant was "consciously indifferent to the consequences." Honaker v. Leonard, 325 F. Supp. 212 (E.D.Tenn. 1971) At the very least, the aforesaid conclusion was just as "evident" as the conclusion of the Panel. Obviously, all presumptions were not given to the non-moving party.

9. The Court of Appeals found and Respondent now argues there was no evidence that the Defendant trucking company intentionally violated federal standards.

A. The facts presented at trial were that Federal regulations require a driving test and written test to be given (49

C.F.R. § 391.35). Neither test was given to the driver before the truck was entrusted. (App. 72, 201-202). Importantly, Defendant trucking company claimed to have given the required road test and the required written test and actually gave the driver a card signed by the trucking company certifying he had been so tested by Defendant trucking company (App. 78, 205). When faced with testimony of two witnesses that no road test had been given, the owner of the trucking company claimed that he had surreptiticusly followed the driver to give a test. Contrary to this testimony, the driver had not

been followed. Unknown to the owner, another driver, who in truth left with the Defendant truck driver, saw that the truck driver was not followed on the date he was hired. (App. 200-201).

B. Further, a written test is required to prevent accidents and "save lives". (App. 491). Contrary to the written certification given to driver, the written test was actually given after the present accident by an open book method (App. 73, 202). Defendant trucking company continued to show contempt of regulations even following the accident and to cover up its wrongdoing.

C. I.C.C. regulations require an investigation into the previous employment and driving record of a new employee (49 C.F.R. § 391.23). No attempt to investigate had occurred on the date of the accident or at any time afterwards (App. 495). Even a cursory investigation would have disclosed that the only road test Defendant driver had been given at another trucking company he had failed (App. 445) and he had been fired at his other previous employer when he was unable to maneuver a tractor trailer truck (App. 213).

D. The certificate, relied upon so heavily by Respondent and given such great weight by Judge

> Nelson by the Appellate Court's Opinion, was actually bought for One Dollar ($1.00) at a truck stop (App. 205). Importantly, it did not comply with the federal regulations (compare Exhibit 25, Exhibit 26 and 49 C.F.R. § 391.31(f)).

In support of their position that no evidence was introduced meriting the submission of this case to the jury, Respondents on page 11 of their brief claim that the "The trial court gave a very good summary of the case...". There follows a quote. The quote is not from the Trial Court at all. The quotation is from the opinion of the Court of Appeals resulting from the reassessment of the evidence as written by Judge Nelson.

Actually, the trial judge who heard the evidence, stated, contrary to Respondents claims that "...there was substantial evidence in the record from which the jury could have concluded that punitive damages were warranted." And further specifically found that "...the Plaintiffs produced a great deal of evidence regarding why their position of punitive damages was appropriate and should be sustained". See Appendix C to Petition to Certiorari, pages 5-6, 16. That this Appellate Panel reweighed the evidence, discarded certain evidence, gave no inferences in favor of the non-moving party, and reached its own conclusions is clear.

II.

THIS CASE HAS FAR RANGING APPLICATION TO CIVIL LAW AND PRESENTS AN OPPORTUNITY FOR THIS COURT TO SPEAK FOR THE FIRST TIME ON AN ISSUE WHERE CONFLICT EXISTS AMONG THE CIRCUITS AND ON AN ISSUE WHICH ARISES TIME AFTER TIME.

1. Respondents admit that a conflict exists among the circuits as to the standard to be applied in reviewing the propriety of a motion for directed verdict and admit the "question may be subject to debate". (Respondents Brief, page 6). Actually, a significant conflict exists among the circuits. Cases denoting the conflict are attached herein as Appendix A. The court is further directed to cases collected by Professor Moore at 2 A. J. Moore and J. Lucas, Moore's Federal Practice, §50.06 (1986). There cases are cited out of the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th and 11th Circuits where a federal standard has been applied. The Federal standard requires "substantial" evidence whereas Tennessee merely requires "any" evidence to avoid the motion. Potter v. Tucker,

688 S.W.2d 833 (Tenn. Ct. App. 1985). See also decisions from the 2nd, 3rd, 5th, 6th, 7th and 8th Circuits where state law on the issue was held to be controlling. (Note in the 7th Circuit an "aberration" occurs where a Federal standard was applied!)

Importantly, we have in this instance an Appellate Panel applying a very stringent standard where evidence is reweighed. If this case had arisen before another Circuit, a different standard clearly would have applied and the result would have been outcome determinative. Quite simply, if the evidence presented by Plaintiffs had been given weight, the punitive damage verdict would not have been disturbed.

Respondent argues that this Court must review the evidence to determine if

the facts at the trial court level were sufficient to create a jury question. While such a review using the proper standard was required by the Court below, this Supreme Court need not so review. This Court need only direct the Sixth Circuit Court of Appeals as to what standard of review is necessary. In fact, this case presents a clear and compelling opportunity for this Court to define a much needed uniform standard of review throughout the United States.

III.

THE COURT IMPROPERLY APPLIED APPLICABLE LAW

Contrary to the insistence of Respondent herein, the Appellate Panel herein applied an improper legal standard under Tennessee law. At page 10 of the Opinion, the Panel obviously applies

an Arkansas standard requiring mens rea, or sufficent mental state to imply malice, before punitive damages may be awarded. Tennessee has no malice requirement. Inland Container Corp. v. March, 529 S.W.2d 43 (Tenn. 1975). The Opinion even cites from a Vanderbilt law review which does not address Tennesseee law. Tennessee law is discussed in a Tennessee Law Review Article:

> The (Tennessee) decisions seem to follow a somewhat liberal policy, permitting punitive damages in cases of gross negligence as well as malicious conduct...[t]here is a tendency to expand the master's liability for the wrongful acts of his servants. Furthermore, the jury is given wide discretion in its assessment of punitive damages. From a survey of the cases reported, it is obvious that those who believe that punitive damages cannot be justified in theory will have to look to the legislature, and not to the courts for relief. 27 Tenn.L.Rev. at 389.

Had the Tennessee standard been applied, there is no question but that

the trial judge's finding of substantial evidence would have been supported.

> Whether or not punitive damages are to be awarded at all and if so the proper amount of such damages is pre-eminently for the jury to decide; but the discretion of the jury in fixing the amount of punitive damages is not beyond supervision by the Court.

Coppinger Color Lab, Inc. v. Nixon, 698 S.W.2d 72 (Tenn. 1985); Whittington v. Grand Valley Lakes, Inc., 547 S.W.2d 241, 243 (Tenn. 1977); Pitner v. FDIC, No. 85-175-II, Slip Op. (Tenn. Ct. App. August 1, 1986) ("the question of punitive damages is always for the jury to decide no matter what the facts are").

Under Tennessee law a jury question is created where a driver fails to take precautions knowing a hazard is created. Sakamoto v. NAB Trucking Co., Inc., 717 F.2d 1000 (6th Cir. 1983); Garner v. Maxwell, 360 S.W.2d 64 (Tenn. Ct. App. 1961); Grizzard & Cuzzort v. O'Neill, 15 Tenn. App. 395, 399-400 (1932).

CONCLUSION

Petitioners earnestly petition this court to grant a writ of certiorari in this cause.

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APPENDIX

Circuits applying a Federal standard of review requiring the existence of "substantial" evidence to avoid a motion for directed verdict:

Cir.	Case
2nd	Reynolds v. Pegler, 223 F.2d 429 (2nd Cir. 1955) (holds Federal law controls) (Conflict within this Circuit.)
3rd	Walsh v. Miehle-Goss-Dexter, 378 F.2d 409 (3rd Cir. 1967) (holds Federal law controls) (Conflict within this Circuit.)
4th	Owens v. Bourns, Inc., 766 F.2d 145 (4th Cir. 1985) (holds Federal law controls)
5th	Dobbs v. Gulf Oil Co., 759 F.2d 1213 (5th Cir. 1985) (holds Federal law controls)
7th	Kuziw v. Lake Engineering Co., 586 F.2d 33 (7th Cir. 1978) (holds Federal law controls)
9th	Safeway Stores v. Fannan, 308 F.2d 94 (9th Cir. 1962) (holds Federal law controls)
10th	Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir. 1984) (holds Federal law controls)

APPENDIX - Continued

Cir.	Case
11th	Federal Kemper Life Assur. Co. v. First National Bank, 712 F.2d 459 (11th Cir. 1983) (holds Federal law controls)

Circuits holding that State standards of review apply:

2nd	Merced v. Auto Pak Co., 533 F.2d 71 (2nd Cir. 1976) (holds State law controls) (Conflict within this Circuit.)
3rd	Stopper v. Manhattan Life Ins. Co., 241 F.2d 465 (3rd Cir. 1957) (holds State law controls) (Conflict within this Circuit.)
6th	Toth v. Yoder, 749 F.2d 1190 (6th Cir. 1984) (holds State law controls)
7th	Perzinski v. Chevron Chem. Co., 503 F.2d 654 (7th Cir. 1974) (holds State law controls)
8th	Lindsay Constr. Co., v. Erickson, 352 F.2d 425 (8th Cir. 1965) (holds State law control)

In Tennessee the standard whether there is any evidence to support the verdict below. This standard is considerably less stringent than the Federal test.

Supreme Court, U.S.
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No. 86-1849

In The

Supreme Court of the United States

October Term, 1986

Frances Lola Womack, Individually, and as Surviving Spouse of William Sydney Womack, Deceased,
and
James A. Chandler and wife, Iva I. Chandler,
Petitioners,

v.

Donald J. Gettelfinger & wife, Doris Y. Gettelfinger, d/b/a Gettelfinger Farms
and
Charles S. Ritter,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

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I. ARGUMENT

A. Dodging Weight Scales?!

In their Reply Brief the Petitioners claim as "Actual fact shown" that Mr. Ritter was "illegally dodging the weight scales on the interstate; . . ." We expect vigorous advocacy on the part of counsel, and we can understand an occasional inaccuracy, but this claim appears to be an intentional misrespresentation of the facts. To illustrate the point we have included, as Appendix A to this brief, copies of each page of the record cited by the Petitioners for their "Actual fact shown" (Appendix, Court of Appeals, 114, 170-171, 216, 230-32, 263, 395). In those pages Larry Goode, the Petitioners' expert in truck driving, testified that certain weight scales on I-40 could be avoided by taking the Highway 95 exit and driving *south* on Highway 95 around the scales, and he admitted that on a previous occasion several years earlier he had used that route to avoid the scales. Mr. Goode also testified that Mr. Ritter had been riding with him on that previous occasion. Be that as it may, the accident at bar occurred on Highway 95 several miles *north* of I-40. More importantly, neither in the pages cited by the Petitioners, nor anywhere else in the record, is there any indication that the truck was overweight in the first place, much less that Mr. Ritter was dodging weight scales.

Having reviewed the pages the Petitioners refer to as citations for their claim, we turn to certain other pages of the record *not* referred to by the Petitioners, but which the Court will find highly informative. These pages (Appendix, Court of Appeals, 217-220), included in this brief as Appendix B, contain the comments of the Trial Court and Counsel at a certain bench conference.

In the bench conference the question was raised of whether the truck was overweight. The response of Petitioners' counsel was "We can't prove that . . . . Well, I think we can't prove he was overweight." Appendix B, this brief, at App. 10. Counsel had asked the Court's permission to question the witness about a previous occasion when the witness had turned around to avoid the weight scales. After hearing Counsel's admission that he had no evidence that Mr. Ritter's truck was overweight, the Court instructed Counsel that he might ask the witness whether he turned around, but not why he turned around, and admonished "Don't try to say he was dodging the scales." Appendix B, this brief, at App. 10-11.

Thus we see that the Petitioners are not content with the facts of their case. Although they now claim the "Actual fact shown" is that Mr. Ritter was illegally "dodging" weight scales, their counsel admitted at trial that they had no proof the truck was overweight and no witness ever suggested that Mr. Ritter was on the road for other than his stated purpose of looking for diesel fuel. Such hyperbole and characterization is typical of the Petitioners' case as a whole.

B. Substantial Evidence v. Any Evidence—Tennessee Law

1. Tennessee Law

In the Reply Brief the Petitioners embellish what they perceive as a fundamental distinction in the standard by which the Tennessee courts and the Federal courts review motions for directed verdict. The Federal standard requires "substantial" evidence, say the Petitioners, whereas Tennessee merely requires "any" evidence to avoid the motion. Petitioners' Reply Brief, at 15.

The position of the Respondents is that there is little or no difference in the standards and that it makes no difference which is used. As with all jurisdictions, Tennessee has numerous cases which discuss this point and all of the cases use slightly different language. The Petitioners have seized upon one particular case, *Potter v. Tucker,* 688 S.W.2d 833 (Tenn. App. 1985), without advising the Court of the other relevant authorities. The opinion in *Potter v. Tucker* does state that the Court should not direct a verdict if there is "any material evidence" in the record to support it.

However, the Tennessee Supreme Court holds that the standard is "whether there was any *substantial evidence* to support the verdict" (emphasis added). *D. M. Rose and Company v. Snyder,* 206 S.W.2d 897, 901 (Tenn. 1947). That ruling was followed in *Phelps v. Magnavox Company of Tennessee,* 497 S.W.2d 898, 904 (Tenn. App. 1972).

The Tennessee Court of Appeals in *Cude v. Culberson,* 209 S.W.2d 506 (Tenn. App. 1947), reiterates that "substantial" and "material" evidence must be shown, and then defines "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Further, "more than a 'scintilla' is requisite . . . ," and more than a 'spark or glimmer' is required." *Cude v. Culberson,* at 511-512. Then the Court points out:

> With the tacit approval of our Supreme Court, this Court has said "The mere dogmatic assertion which does not appeal to the reason of the court, which does not have substantial and relevant consequence, which does not have fitness to induce conviction, is not proof even if uncontradicted, and does not interfere with

the duty of the court to direct a verdict." *Cude v. Culberson,* at 512.

2. Changed Their Mind

Although the Petitioners now claim that Tennessee goes by the "any evidence" standard, they have previously recognized in these proceedings the correctness of the "substantial evidence" standard. On page one of their brief to the Court of Appeals they listed the issues presented for review. Their first issue was as follows:

> 1. Was the jury's verdict of punitive damages supported by *substantial evidence?* (Emphasis added.)

It is fitting, and indicative of the merits of the Petitioners' case, that they open their argument in the Court of Appeals by asserting that the "substantial evidence" standard should be used and then close their argument before the Supreme Court by urging that it should not have been used!

II. CONCLUSION

For the additional reasons set out herein, the Respondents pray that the Petition be found to be without merit, and accordingly denied.

Respectfully submitted,

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APPENDIX A

Ritter/Direct

(p. 114) Q. You don't remember that?

A. No, sir.

Q. All right. When you got off the interstate, when you come down there to 95 are there any service stations or anything that is there immediately at that exit?

A. No, sir.

Q. It is just essentially a rural area?

A. Yes, sir.

Q. But you turned left and went the direction we call north toward Oak Ridge?

A. Yes, sir.

Q. And the sign said it would be Melton Hill Dam in that direction, didn't it?

A. I don't remember seeing it.

Q. If the sign had said Melton Hill Dam, would you have known there might be more fog at that point?

A. Yes, sir.

Q. So you turned in the direction going to Oak Ridge and you had to drive for a half a mile before you come to the first restaurant or anything?

A. No. I don't know because I didn't—I didn't—I was just driving to find a—excuse me—

• • •

(p. 170) actually come down on the axle or does it come down on the wheels?

A. It comes down on the wheels.

Q. I got confused on that. You don't mean clear down to the axle?

A. No. Clear down to the wheels, the tires.

Q. Is there any affect also in the loaded nature of a trailer as to making it tilt one way or the other?

A. Yes, sir. Your load can shift on you.

Q. Is there any difference in turning a trailer like that, a van-type trailer, when it's loaded and empty?

A. Yes.

Q. State whether or not you can turn a van-type trailer empty and have some tilt in it without having the same results you would with a loaded truck?

A. I didn't understand your whole question.

Q. Okay. That's all right. How full was that trailer?

A. Filled all the way from the front (p. 171) to the back from the floor to the top.

Q. As you sat there, you saw the ditch? Is that what you said?

A. Yes, sir.

Q. Just tell the Court and Jury what you did.

A. Well, as I was proceeding outward, I was watching in my mirrors the best—what light that I had from the

lights on the trailer, I was watching my rear wheels, keeping them away from the ditch. And by the time I looked up and I saw these headlights, and by the time I saw the headlights I couldn't tell what kind of car or nothing, I just knew it was another vehicle. And by the time I looked up, I was already crossways in the road and there wasn't no place that I could go. And I thought at first the car missed me.

Q. All right, sir. Now, Charles, before you pulled out of that driveway, did you look either direction?

A. Yes, sir.

Q. Do you know how many times?

A. Several.

Q. Could you see anything coming?

A. No, sir.

* * *

Goode/Direct

(p. 216) A. That when he went in after the accident they had him to sign 14 blank log sheets.

Q. Who had him do that?

A. Mrs. Gettlefinger the way I understood it.

Q. Had Mr. Ritter ever been on Interstate 40 before, Mr. Goode?

A. Yes, sir.

Q. With you?

A. Yes, sir.

Q. Under what circumstances?

A. Well, he used—we used to haul produce like I said earlier, and we would run into Knoxville, deliver flowers around this area and we would run into the East Coast quite a bit, so we ran 40 and 81 all the time.

Q. Had you ever been on 95?

A. Yes, sir.

Q. Had Mr. Ritter been with you when you were on 95?

A. Yes, sir.

Q. Had you ever turned around on 95?

A. Yes, sir.

Q. Did you make deliveries on Highway

* * *

Goode/Cross

(p. 230) left out on a Thursday, Friday and Saturday. It took three days to make that round.

Q. And Ritter was with you?

A. Yeah.

Q. That is either '74 or '75?

A. Yes, sir.

Q. Is that the only time you and Ritter then were ever on that road?

A. No, sir.

Q. On 95?

A. No, sir.

Q. When else in '74 or '75 one? When else besides then?

A. We had come out of Nashville, Tennessee hauling produce and was coming up to Virginia and the D.O.T. was checking on the scales, and I don't cross the scales if I can keep from it with the Department of Transportation there.

Q. Okay. You were driving?

A. Right.

Q. And you were operating what kind of a vehicle that day?

A. I was driving a Freight Liner, White Freight Liner.

(p. 231) Q. A White Freight Liner on that day?

A. Right. There was a reefer unit behind it.

Q. You were pulling a reefer unit behind?

A. Yes, sir.

Q. When was that?

A. This would have been about in '82.

Q. And Mr. Ritter was with you?

A. Yes, sir.

Q. And what kind of a trailer were you pulling?

A. It was always a 42 footer.

Q. What kind of name brand?

A. A Tempte.

Q. Tempte?

A. Tempte.

Q. And you exercised your discretion to get off of that scale, off of that place on that day; right?

A. Yes, sir.

Q. And what did you do?

A. I was going down 95. I heard the D.O.T. was coming at me, so I had to turn around and go (p. 232) back the other way to get away again and wait them out.

Q. So you were trying to dodge the scales?

A. Yes, sir. That is a known route to all truck drivers. You can get around the scale that way.

Q. How do you go when you go out 95 and dodge the scales?

A. You go up the ramp, take 95 South, come right around to the truck stop and get back on and you miss the scale.

Q. And you take 95 South?

A. Yes, sir.

Q. So that means that if you were going to try to dodge the scales like you were trying to do you would be going—and we are in a courtroom now—

A. Okay.

Q. —and we are facing in these directions. I represent this to you that is east.

A. Well—

Q. East. I am pointing toward the jury.

A. Right.

Q. Towards the door of the courtroom is south?

Goode/Redirect

(p. 263) Q. Did he say anything about the tractor?

A. No, sir, he didn't say anything about the tractor.

Q. Do you use those same kind of refrigeration units?

A. Yes, sir.

Q. If you have an eighth of a tank and you're trying to maintain a zero load, how much time do you have?

A. You figure anywhere between a gallon to two gallon an hour on fuel.

Q. A gallon to two gallons an hour?

A. Yes, sir.

Q. If it holds 50 gallons, then, how many hours are you talking about if you have, say, down to an eighth of a tank?

A. Well, I don't know the capacity of the units on their trailers. Some units have 30, some have 50 gallon.

Q. Assume the testimony in this case is the 50 gallons.

A. You would say four hours, three

* * *

Walker—Redirect

(p. 395) A. There is the sign of the state route below it with the posted weight limit on the road, twelve tons, saying that there shouldn't be any loaded vehicles on this road.

Q. How much does a tractor-trailer truck normally weigh loaded?

Mr. Yancey: Your Honor, this interfered with the ruling of the Court previously and Mr. Vines well knows that and I object to that question.

The Court: Sustained. That's irrelevant. Go on.

The Witness: Here at the intersection, like I say, there's construction on it now. We turned to the left. Going back under the interstate to the left on the other side there was some construction when we were down there. There were not any buildings of any kind but there was construction going on.

By Mr. Vines:

Q. Are there any service stations or anything at this exit in the immediate vicinity like you sometimes see?

APPENDIX B

Goode/Direct

(p. 217) 95?

A. Yes, sir.

Q. Were you on 95 for any reason other than—wait just a moment. Maybe we had better get a ruling on that.

(Thereupon, a discussion was had at the bench out of the hearing of the jury.)

Mr. Vines: Your Honor, this witness is prepared to testify that he used this road to duck the scales, that they had turned around at this location before when they heard about the D.O.T. Now, realize that in this case the first car that came on the scene was a D.O.T. car and this man was turning around. We think we know why he was turning around. A D.O.T. car was coming his way, he hears it on the radio and that is why he turns at this place.

Mr. Yancey: No.

Mr. Vines: He said he was off going to get fuel. It goes to his credibility.

Mr. Yancey: I think it's a terrible error to put this into the record at this time.

Mr. Vines: There was a D.O.T. car coming. Anybody on the radio would know that.

(p. 218) The Court: The plaintiff's position is that somebody warned Mr. Ritter on the radio?

Mr. Yancy: There is no evidence he was overweight.

Mr. Vines: We can't prove that.

The Court: Why would he be trying to avoid the scales?

Mr. Vines: Well, I think we can't prove he was overweight. I think that is a reasonable implication. All we can do is try to piece together the evidence.

Mr. Yancey: There was no reason to dodge the scales.

Mr. Tarpy: It would be implied he was overweight.

Mr. Vines: The only thing we can offer really is to his credibility and that is—

The Court: Is he going to testify that he and Ritter had turned around there before?

Mr. Vines: Yes.

The Court: That is relevant. I guess the only problem is whether or not he (p. 219) was doing it for the purpose of dodging the scales.

Mr. Vines: He will say and he said what were you doing there and Ritter said, you know why he was there, but he never actually said I was dodging the scales. That is what he has told me but he didn't say it in so many words. He doesn't know that.

Mr. Tarpy: He can't testify what he doesn't know.

Mr. Yancey: I think it is not error to let him testify he turned around. I can't see going into the rest of it. They have no proof that he was overweight.

The Court: I think what I will do I am going to let you go into everything except the motive for turning around. I think it may be probative but not prejudicial.

Mr. Vines: I am not sure I understand your ruling. What can I ask him?

The Court: Anything except why they were turning around. Don't try to say he was dodging the scales.

Mr. Vines: Or why they had turned (p. 220) around before?

The Court: But the fact they had turned around you can go into.

(Thereupon, the proceeding continued in the presence of the jury.)

By Mr. Vines:

Q. Mr. Goode, it's important to answer only the direct question I ask you.

A. Okay, sir.

Q. And I will ask you had you turned around at a closed place on 95 before called the Fishing Pole when Mr. Ritter was in the truck?

A. Yes, sir.

Q. When you had turned around before, was it necessary that you block both lanes and go onto the far shoulder of the road?

A. Not that I know of, sir. Shouldn't be.

Q. In the Gettlefinger truck do you carry devices such as reflectors, triangles and flares?

A. The truck I drove did not have them in it.

Q. This certificate that you gave to Mr. Goode when he was with you and was your driver for

* * *